DOCKET

No. 87-1816-CFX
Status: GRANTED

Title: Paul Green, Petitioner
v.
Bock Laundry Machine Company

Docketed:
May 4, 1988

Court: United States Court of Appeals
for the Third Circuit

Counsel for petitioner: Melillo,Joseph M.

Counsel for respondent: Caldwell Jr.,Thomas D.

Entry	Date	Note	Proceedings and Orders
1	May 4 1988	G	Petition for writ of certiorari filed.
2	May 27 1988		Brief of respondent Bock Laundry Machine Co. in opposition filed.
3	May 31 1988		DISTRIBUTED. June 16, 1988
4	Jun 20 1988		Petition GRANTED.
			**********
5	Aug 4 1988		Brief of petitioner Paul Green filed.
6	Aug 4 1988		Joint appendix filed.
7	Aug 22 1988		Record filed.
		*	Record, not certified, recieved.
8	Aug 30 1988		Record filed.
		*	Certified copy of appendix, briefs and partial proceedings received.
9	Sep 2 1988		Brief of respondent Bock Laundry Machine Co. filed.
10	Sep 6 1988		Brief amici curiae of Pennsylvania, et al. filed.
11	Sep 13 1988		CIRCULATED.
12	Oct 6 1988	X	Reply brief of petitioner Paul Green filed.
13	Oct 24 1988		Set for argument. Wednesday, January 18, 1988. (2nd case) (1 hr.)
14	Jan 18 1989		ARGUED.

PETITION FOR WRIT OF CERTIORARI

87-1816

No.

In the Supreme Court of the United States

Term, 1988

PAUL GREEN,
Petitioner

vs.

BOCK LAUNDRY MACHINE COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does Federal Rule of Evidence 609 mandate the admission of any felony conviction against a civil Plaintiff, so that in a tort action in which a nineteen-year-old victim lost his arm because of an allegedly defective machine, his credibility could be attacked by evidence that he had once had consensual sexual relations with a girl less than fourteen (14) years of age, or that he had been involved in a burglary?

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TABLE OF CITATIONS

IN THE SUPREME COURT OF THE UNITED STATES

PAUL GREEN,

Petitioner

vs.

BOCK LAUNDRY MACHINE COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Paul Green, respectfully prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Third Circuit, entered in this proceeding on March 14, 1988.

REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

The District Court for the Middle District of Pennsylvania issued an Opinion and Order, and the Third Circuit Court of Appeals issued a Judgment Order, only, which have not been officially reported. The Slip Opinions are reproduced in the Appendix hereto.

The Third Circuit Court of Appeals' Opinion in *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984) is included in the Appendix at p. 11a for the Court's convenience.

JURISDICTION

The Third Circuit Court of Appeals entered its Order affirming the decision of the District Court for the Middle District of Pennsylvania on March 14, 1988. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Rule 609. Impeachment by Evidence of Conviction of Crime.

(a) General rule.—For purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Fed.R.Evid. 609(a)

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed.R.Evid. 403.

STATEMENT OF THE CASE

This product liability action was brought by the Plaintiff, Paul Green, against the Bock Laundry Machine Company for a tragic injury which Paul suffered on June 23, 1984. The case was tried before a jury in the Federal District Court for the Middle District of Pennsylvania and the jury rendered a verdict for the Defendant. Federal jurisdiction was predicated upon diversity of citizenship.

Several grounds for appeal were asserted, and these were denied by both the District Judge and the Third Circuit Court of Appeals. The only issue which Paul Green desires to bring before the Supreme Court is whether the Third Circuit Court of Appeals has interpreted Federal Rule of Evidence 609 in a manner which is improper and proved devastating to his civil claim. Some discussion of the background facts will place this case in its proper context and illustrate just how unfairly the Third Circuit's interpretation of the Rule operated in his case.

On June 23, 1984, Paul Green was a nineteen-year-old employee at the Lemoyne Minit Car Wash, working for minimum wage. He had been hired six days previously, and it was his primary job to wipe cars dry after they had been washed in the automatic washer. He was also asked to replenish the supply of wiping cloths by laundering them in the car wash's own facilities, consisting of a washing machine, a Bock centrifugal water extractor and a dryer. The extractor was a Bock M-100, manufactured in 1965, and it consisted of a perforated basket which rotated at approximately 1600 RPM on a shaft connected to a

motor in the unit's base. The water would be forced outward into a collecting tub or curb, which drained the liquid through a pipe. The power on the machine was activated when the lid would be closed and the handle moved over it; a lug also moved into place under the lid to prevent its opening. When the handle was moved away from the lid, the power would be cut off. Moving the handle also increased tension on a spring connected to a brake, which was designed to bring the heavy, stainless steel basket to a stop within a reasonably short period of time.

According to the manufacturer's records, the extractor was designed with a safety device which prevented the lid from opening until the brake had stopped the machine completely. This safety device was dependent upon an external cable which connected the handle and lid with a mechanism inside the machine's base. The design was one which had been pioneered decades earlier, and which Bock had used until the late 1970's, although more modern safety systems have been designed and, in fact, were used by Bock in other of its models.

It was undisputed in this case that at the time of the accident both that the safety device and the machine's internal brake were non-operational, and, that the lid could be opened while the centrifuge continued to spin at its maximum rate. Additionally, the basket would take fifteen (15) minutes, rather than a few seconds, to stop completely. No one, including the then owners of the machine, realized that this was in any way unusual.

According to the car wash owner, employees were told not to place their hands in the extractor when it was spinning. According to Paul Green, other employees told him to wrap a towel around his hand and place it with

pressure on the center spindle in order to slow the basket. The owners admitted that the demand for towels was very great when the car wash was busy, and another of their employees admitted that others, besides Paul Green, had used different methods to slow the machine.

On June 27, Paul was trying to slow the machine in just this manner. The towel wrapped around his wrist apparently became entangled with the perforated basket, and it tore his arm completely off, at the shoulder. Nearby employees saw Paul Green fall to the floor, while his right arm continued to bounce around in the centrifuge.

The proof in this case centered on the question of whether or not the machine's safety features were defectively designed and whether it was equipped with adequate warnings. Experts testified extensively on both sides.

Paul Green has been convicted of several felonies during his young life, including burglary and conspiracy to commit burglary and statutory rape. Anticipating that the defense would introduce these crimes into evidence in this product liability case, Plaintiff filed a Motion in Limine, but frankly admitted in said Motion that the District Court was bound by the panel decision of the Third Circuit in *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984), in which two of the judges interpreted Federal Rule of Evidence 609(a)(1) to give the District Court *no discretion* in deciding whether the probative value of such evidence was outweighed by its prejudicial effect in a civil proceeding. The majority of the panel admitted that its decision was not in keeping with that of the Eighth Circuit in *Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983) or the Fifth Circuit in *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir. 1983),

and also admitted that such an interpretation could lead to unfair results; *see*, *Diggs* at 741 F.2d 582.

The *Diggs* case was appealed to the United States Supreme Court, but that Court refused to grant certiorari, although three justices dissented, noting the conflict in interpretation which the Rule has received among the Circuits, and the potential unfairness of the Third Circuit decision; *see*, *Diggs v. Lyons*, 471 U.S. 1078, 85 L.Ed.2d 513, 105 S.Ct. 2157 (1985) and the dissenting opinion of Justices White, Brenner and Marshall. In a prior case, *Furtado v. Bishop*, 604 F.2d 80, *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980), the United States Supreme Court had also declined to consider the issue.

Because the trial judge was bound by the Third Circuit's ruling in *Diggs*, such evidence was received by the jury. It was not probative on any issue, and served only to smear the Plaintiff's reputation.

REASONS FOR GRANTING THE WRIT

Petitioner requests that this Court reconsider the panel decision in *Diggs* in light of the forceful reasoning of the Courts in *Czajka* and *Shows*, and the dissent of Judge Gibbons in *Diggs*. The decision of the Eighth Circuit in *Czajka* is worth quoting at length:

> [1] Some commentators have argued that Rule 609(a)(1)'s balancing test was intended to protect only criminal defendants and not civil litigants. See S. Saltzburg & K. Redden, Federal Rules of Evidence Manual, 365 (3d ed. 1982). We need not resolve this issue, because Rule 609 does not foreclose the district court's duty under 403 to weigh the probative value of the evidence against the danger of unfair prejudice. Shows v. M/V Red Eagle, 695 F.2d 114, 118-119 (5th Cir. 1983). Even if the intended focus of Rule 609 is avoidance of prejudice to criminal defendants, the Rule does not mandate a 'mechanical and restrictive result when the party facing the potential prejudice is one other than a criminal defendant.' Tussel v. Witco Chemical Corp., 555 F. Supp. 979 at 983 (W.D. Pa. 1983) (order granting motion in limine). Rule 403 is 'a rule of exclusion that cuts across the rules of evidence,' and it must be applied in civil cases when a party seeks to cross-examine another about criminal convictions. Shows v. M/V Red Eagle, supra, 695 F.2d at 118.

Czajka, supra, at 703 F.2d 317 (1983).

Nowhere is the unfairness of not permitting a lower Court any discretion more apparent than in a case such as this, where the nineteen-year-old Plaintiff's arm was torn from his body by an allegedly defective machine, and the defense was permitted to attack his credibility by evidence that he once had consensual sexual relations with a girl less than fourteen (14) and had been involved in a burglary. These matters have no bearing upon his credibility but, to the defense, weigh heavily upon the issue of his "worthiness" to receive compensation for his injuries. The issue of the victim's "worth" is frequently both the first and last line of defense in a civil case. The Defendant's hope is that this consideration will permeate the jury's deliberations, so that a close case is decided in its favor, or that any verdict rendered to the Plaintiff is less than that which the evidence would otherwise suggest. It is, in fact, the civil equivalent of obtaining a criminal conviction by showing that the Defendant was involved in prior criminal activity, which in fact has no bearing upon his credibility. The rule clearly gives the Court discretion to control the admission of evidence in order to avoid that result in a criminal proceeding, but the Third Circuit believes it permits this same disreputable tactic in a civil case.

This Court should be permitted to decide whether the Legislature really intended to enact a Rule of Evidence which is so patently unfair. The *Diggs* decision was reasoned solely from the Third Circuit's study of the legislative history. That Court was highly selective in the portions it emphasized and reached a narrow interpretation because it ignored an important precept of interpreting legislation, which assumes that the Legislature does not intend to enact a law which generates bizarre results.

The dissenting Justice in the *Diggs* case fully recognized this:

> The snippets of legislative history in which four Members of Congress anticipated that some court might reach so ridiculous a result, 120 Cong.Rec. 2377, 2379, 2381, do not persuade me that the result was intended by Congress. The overwhelming weight of the legislative background material on Rule 609 suggests a preoccupation by Senator McClellan and others with defendants in criminal proceedings. The result was, in my view, a legislative oversight as to the legislation's effect upon civil plaintiffs. By the time the oversight was recognized by Congressmen Dennis, Hogan, Wiggins and Lott legislative fatigue had set in, and the resulting ambiguity in Rules 403 and 609(a) was left unresolved.

CONCLUSION

Irreconcilable conflicts currently exist among the Circuit Courts concerning the proper interpretation of Federal Rule of Evidence 609 in civil cases. The Third Circuit has taken the narrow approach which even the *Diggs* majority admits leads to absurd results, while the Fifth and Eighth Circuits have attempted to harmonize the Rule with the dictates of common sense. A victim forced to litigate his claim in the Third Circuit has no hope of recourse unless and until this Court resolves the conflict.

This case is important, both to Paul Green and to the general public. When a seriously injured victim does not receive fair and adequate compensation, he is not the only

loser. The public is frequently called upon, throughout the victim's lifetime, to provide the support which the private sector has avoided paying. This is not to say that a defendant in a civil case should be forced to pay without a finding of liability, but that the jury should not be distracted from its consideration of the liability issue by extraneous concerns. Until this Court reviews Federal Rule of Evidence 609, which is applied in the Federal Courts many times every working day, this is precisely what will continue to occur.

Respectfully submitted,
ANGINO & ROVNER, P.C.
NEIL J. ROVNER
JOSEPH M. MELILLO
Attorneys for Petitioner

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CERTIFICATE OF SERVICE

I, hereby certify that on this 2nd day of May, 1988, five (5) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to James G. Nealon, III, Esquire, Caldwell & Kearns, 3631 North Front Street, Harrisburg, PA 17110. I further certify that all parties required to be served have been served.

ANGINO & ROVNER, P.C.
(s) NEIL J. ROVNER
JOSEPH M. MELILLO
Attorneys for Petitioner

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APPENDIX

PAGE

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PAUL GREEN,

Plaintiff

vs.

BOCK LAUNDRY MACHINE COMPANY,

Defendant

CIVIL ACTION NO. 86-0688
Filed Harrisburg, PA
Sep. 4, 1987

MEMORANDUM

Pending now is plaintiff's motion for a new trial, following a verdict for defendant in this products-liability case.

On June 23, 1984, the plaintiff suffered a serious and tragic accident at his place of employment, the Lemoyne Minit Car Wash. On that date he was attempting to slow the rotation of the heavy drum, or basket, of a water extractor.[1] This was accomplished by reaching into the interior of the machine, placing his hand against the center spindle, and applying pressure. A towel he had wrapped around his hand apparently became caught on the spindle or the drum, and as the basket continued to spin plaintiff's

[1] The extractor is a commercial machine used to remove excess water from towels used by the car wash. It is comparable to the action of an automatic home washing machine during its 'spin dry' cycle.

arm was literally torn from his body at the shoulder. Plaintiff instituted suit against the defendant, a manufacturer of commercial laundry equipment, who made and sold the extractor in 1965. Plaintiff contended the product was defective when it left the defendant's control. However, the jury concluded otherwise and responded to a special interrogatory that the product was not defective.

When manufactured in 1965 the extractor was equipped with several safety features and devices. First, the machine would not operate unless the lid of the basket was closed. This was because the arm or lever that activated the motor switch could not be moved to the "on" position when the lid was open. With the lid closed, however, the arm could be swung over the lid and power would be supplied to the motor. With the handle in this position, just above the lid, the lid could not be opened. In addition, a mechanical device inside the machine locked the lid whenever the arm was moved to the "on" position.

The second safety device was a brake, designed to stop the rotating basket whenever the power source was interrupted. In normal use, when the arm was returned to the 'off' position the supply of power was interrupted and the braking device was automatically activated. This mechanism would stop the rotating basket within ten or twelve seconds. Unfortunately, someone unknown dismantled this safety feature more than fifteen (15) years before plaintiff's accident.

The evidence produced at trial disclosed that at some point after the machine was placed in service the cables that activated the braking mechanism were severed and removed. Without the braking feature the heavy basket or drum would continue to rotate freely for about fifteen or

twenty minutes after the control lever was moved to the 'off' position. This allowed the lid of the extractor to be opened while the heavy basket continued to spin by centrifugal force. It was not apparent to anyone at the car wash that a braking mechanism had ever existed, and it was assumed by the owners and the employees that the long slow down time for the drum was normal.[2] All of the employees, including the plaintiff, had been warned never to place their hands or arms inside the machine as long as the drum was turning. In fact, plaintiff had been told he could lose his arm in this way.

Against this factual backdrop the court will address the issues raised in plaintiff's motion for new trial.

I. Admission of Plaintiff's Criminal Record.

Plaintiff acknowledges the admission of evidence of a criminal record is in accord with the law of the Court of Appeals for the Third Circuit. *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984). This issue is apparently being preserved for review in the event of an appeal.

II. Testimony that Plaintiff had been Warned About Placing His Hand in the Extractor.

Plaintiff contends it was prejudicial error to admit evidence concerning the defense of assumption of risk. He

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[2] While there was no direct evidence to explain the reason for disengaging the braking mechanism, one possibility was eventually found. It was discovered after plaintiff's accident, when the extractor was dismantled, that water had been leaking on the braking equipment through a hidden gash in the interior of the machine. This had caused the brake to become rusted and frozen. Apparently, the proprietor of the car wash at that time (1966-1968) removed the safety features so that the extractor could be used, albeit without the brake.

argues that the jury may have considered his actions as contributory negligence, which is no defense in a products liability suit, and may have allowed this evidence to influence its decision for the defendant, when it declared the product was not defective. Although plaintiff had worked only one week prior to his accident, he was told by the two owners and three co-workers never to place his arm in the machine while it was moving. We do not have the benefit of a trial transcript, but recall one witness warning plaintiff, specifically, that he could lose an arm in this manner. We agree with plaintiff that the issue, in the assumption of risk defense, is whether *plaintiff* personally understood he could be seriously injured by his actions, but the evidence introduced on this point was more than sufficient to create an issue of fact for the jury. Indeed, it would have prejudiced the defense to remove this issue from the case.

In any event, the jury never reached the issue of assumption of risk and determined only that the product was not defective. It is unwarranted speculation by plaintiff to argue that the jury may have considered his actions in deciding that the product was not defective.

III. Plaintiff Contends that the Wrong Standard was Applied by the Court in Charging the Jury on the Law Concerning Defendant's Duty to Warn Users of a Dangerous Condition.

Plaintiff argued at trial that the machine was defective because it lacked a warning of the danger of reaching into the machine while it was operating.[3] His exception in-

[3] Defendant produced evidence that a warning label was attached to the machine when it was sold in 1965, although no one ever recalled seeing a warning. Plaintiff argued a more permanent warning should have been affixed, such as a warning engraved permanently in the lid.

volves the instructions given to the jury. Plaintiff asserts that the court instructed the jury that plaintiff had the burden of proving that a warning would have *prevented* his injury. He contends he was only required to show that the absence of a warning increased his risk of harm. We are again handicapped by the lack of a transcript but we are confident we did not instruct the jury that the plaintiff would have to prove that a warning would have caused him to alter his behavior.

According to our best recollection the jury was instructed that it must determine if a warning was required or not, and if so whether any warning that was given was inadequate. We also informed the jury that if the danger of harm was obvious or known to the ordinary user, then the lack of a warning would not render the product defective. The jury was no doubt instructed that it could consider whether plaintiff would have been injured even though the machine contained a warning, and that if it concluded plaintiff would not have heeded a warning, then the lack of warning in this instance would not be a basis for concluding the product was defective.

If the machine was found to be defective because it lacked a warning, the jury was also told that plaintiff would then have to show that the absence of a warning was the cause of, or was a substantial factor in causing, his injury. This legal instruction, of course, addressed the issue of causation, which required plaintiff to prove by a fair preponderance of the evidence that any defect was a cause of his injury. The fact that the jury never reached the causation question cannot diminish the need to provide the jury with the instructions given. We find no merit in this argument, and because no transcript has been provided it has not been properly preserved for consideration on the pending motion for new trial.

IV. Other Jury Instructions.

Plaintiff objects to an instruction given to the jury, to the effect that his employer was required by law to maintain safety devices on all industrial equipment. Plaintiff contends that such an instruction was irrelevant. We disagree. The defendant in this case argued that if anyone was responsible for plaintiff's accident it was the car wash owner, who disconnected the braking device prior to 1968. The seller of an allegedly defective product is permitted to contest causation, and it was in this context that the instruction was given, i.e. defendant argued that the product was not defective when sold and that the employer was responsible subsequently to maintain the safety devices in working order. It is permissible for a defendant in a products case to argue that an employer's action is the sole cause of an injury to an employee. *Van Buskirk* v. *Carey Canadian Mines, Ltd.*, 760 F.2d 481 (3d Cir. 1985); *Brogley* v. *Chambersburg Engineering Co.*, 306 Pa. Superior 316, 452 A.2d 743 (1982).

V. Voir Dire Questions.

Defendant also objects to the court's failure to ask two voir dire questions concerning jurors attitudes on whether there is a lawsuit or liability crises or whether or not injured people should sue. Plaintiff waived this objection when counsel indicated his satisfaction with the extent of the voir dire examination, and made no request to ask the particular questions. Furthermore, we covered the sense of the questions when we asked about any jurors' involvement in the insurance industry, or if any juror had a fixed opinion about whether one in plaintiff's position should or should not bring a lawsuit. Under Fed. R. Civ.

Procedure 47(a) voir dire is a matter within a court's discretion and in our opinion nothing connected with voir dire in this case would warrant a new trial.

VI. Conclusion.

Although the plaintiff's accident was extremely serious and carries long term implications for him, the jury determined as a factual matter that the laundry machine manufactured and sold in 1965 by the defendant was not defective at that time. We believe this was a fair and reasonable conclusion under all of the evidence. Plaintiff presented and argued his contentions concerning the product in a professional and competent manner, but the weight of the evidence strongly favored the defendant. In our opinion there were no trial errors, but if the trial was not perfect in every respect plaintiff suffered no prejudice from any minor flaws.

We will issue an order denying plaintiff's motion for new trial.

s/ William W. Caldwell
United States District Judge

Date: September 4, 1987

Memorandum and Opinion

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PAUL GREEN,

Plaintiff

vs.

BOCK LAUNDRY MACHINE COMPANY,

Defendant

CIVIL ACTION NO. 86-0688
Filed Harrisburg, PA
Sep. 4, 1987

ORDER

AND NOW, this 4th day of September, 1987, plaintiff's motion for a new trial in this matter is denied.

s/ William W. Caldwell
United States District Judge

Judgment Order

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-5712

PAUL GREEN,

Appellant

v.

BOCK LAUNDRY MACHINE COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 86-0688)
District Judge: Honorable William W. Caldwell

Submitted Pursuant To Third Circuit Rule 12(6)
March 7, 1988

Before: WEIS, GREENBERG, and ALDISERT,
Circuit Judges

Judgment Order

JUDGMENT ORDER

After consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court entered September 4, 1987 be and the same is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,
s/ Weis
Circuit Judge

Attest:
s/ Sally Mrvos
Clerk
Date: March 14, 1988

Third Circuit Court of Appeals Opinion

DIGGS v. LYONS
Cite as 741 F.2d 577 (1984)

Charles DIGGS, Marvon Merritt, William Stovall and Leroy Edney
v.
Superintendent Edmond LYONS, Warden David Owens, Deputy Warden Daughn, Sergeant Dunlevey, Correction Officers Wiley, Marlowe, Upshur, Vasquez, Bozack, Widdop and all unknown correctional officers.

Appeal of Charles DIGGS, William Stovall and Leroy Edney.

No. 83-1803.

United States Court of Appeals, Third Circuit.

Submitted Under Third Circuit Rule 12(6)
May 14, 1984.

Decided July 30, 1984.

Rehearing and Rehearing In Banc Denied Aug. 30, 1984.

Civil rights action was brought alleging unconstitutional use of excessive force by defendants in preventing plaintiffs' escape from county prison and alleging denial of access to legal assistance. The United States District Court for the Eastern District of Pennsylvania, Raymond J. Broderick, J., entered judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, Maris, Circuit Judge, held that district court rightly decided that rule of evidence governing impeachment by evidence of prior conviction compelled the admission of evidence of one plaintiff's prior convictions and that rule of evidence governing exclusion of relevant evidence on grounds of preju-

dice did not give the trial judge discretionary authority to exclude prior convictions as prejudicial to the witness.

Affirmed.

Gibbons, Circuit Judge, filed a dissenting opinion.

1. **Federal Courts—763**

Although, technically, appeal by plaintiffs was taken from denial of plaintiffs' motion for judgment n.o.v. and a new trial, where plaintiffs' motion was timely filed after entry of original judgment and notice of appeal was timely filed after denial of that motion, Court of Appeals would consider the appeal as taken from final judgment.

2. **Civil Rights—13.13(3)**

In civil rights action alleging unconstitutional use of excessive force in preventing plaintiffs' escape from county prison and alleging denial of access to legal assistance, evidence was sufficient to support verdict in favor of defendants. 42 U.S.C.A. §1983.

3. **Civil Rights—13.14**

In civil rights suit alleging unconstitutional use of force in preventing plaintiffs' escape from county prison, trial judge's instruction to jury as to amount of force a correctional officer may use to prevent a prisoner's escape from custody correctly stated the law.

4. **Witnesses—345(1)**

With respect to rule of evidence requiring admission, on the issue of credibility, of evidence of prior felony conviction suffered within ten years, it was congressional intent that, excepting cases of possible prejudice to defendant, judges were to have no more discretion in admitting

evidence of felony convictions than evidence of crimen falsi and that no distinction in this regard could be made between civil and criminal cases. Fed.Rules Evid.Rules 403, 609, 609(a), 28 U.S.C.A.

5. **Witnesses—336**

In civil rights action alleging unconstitutional use of excessive force by defendants in preventing plaintiffs' escape from county prison and alleging denial of access to legal assistance, district court rightly decided that rule of evidence governing impeachment by evidence of prior conviction compelled the admission of evidence of one plaintiff's prior convictions and that rule of evidence governing exclusion of relevant evidence on grounds of prejudice did not give the trial judge discretionary authority to exclude prior convictions as prejudicial to the witness. Fed.Rules Evid. Rules 403, 609(a), 28 U.S.C.A.

Charles Diggs, pro se.

William Stovall, pro se.

Leroy Edney, pro se.

Thomas F. Crawford, Barbara W. Mather, City Sol. of Philadelphia, Barbara R. Axelrod, Deputy City Sol., Ralph J. Luongo, Asst. City Sol., Philadelphia, Pa., for appellees.

Before GIBBONS, GARTH and MARIS, Circuit Judges.

OPINION OF THE COURT

MARIS, Circuit Judge.

The plaintiffs, Charles Diggs, Marvin Merritt, William Stovall and Leroy Edney, brought suit in the district

court under 42 U.S.C. §1983 alleging unconstitutional use of excessive force by the defendants in preventing their escape from Holmesburg county prison in Philadelphia and denial of access to legal assistance. At the close of the plaintiffs' case the trial judge directed a verdict in favor of all the defendants on the access to legal assistance claim and in favor of defendants Lyons, Owens and Daughn on the excessive use of force claim. The trial then proceeded and at the close the jury returned a verdict in favor of the remaining defendants on the excessive use of force claim. Plaintiffs Diggs, Stovall and Edney then made a timely motion for judgment n.o.v. or for a new trial. The motion was denied by the district court and the three plaintiffs filed a notice of appeal from that denial within five days thereafter.

[1] Our court has jurisdiction of the appeal. While technically it was taken from the denial of plaintiffs' motion for judgment n.o.v. and a new trial, the plaintiffs' motion was timely filed after the entry of the original judgment and the notice of appeal was timely filed after the denial of that motion. We therefore consider the appeal as taken from the final judgment. *Jackman v. Military Publications, Inc.*, 350 F.2d 383 (3d Cir. 1965). Two of the appellants, Stovall and Edney, have failed, however, to file briefs or otherwise prosecute the appeal and the appellees' motion to dismiss the appeal as to them will be granted. Appellant Diggs, however, has prosecuted the appeal and we accordingly proceed to consider its merits.

[2, 3] Appellant Diggs argues that there was insufficient evidence to support the verdict and that it was therefore error for the trial judge to deny him judgment n.o.v. Our review of the evidence satisfies us, however, that it was sufficient to support the verdict and that judgment

n.o.v. was properly denied. Appellant Diggs also urges that the trial judge committed errors which require a new trial and that the court therefore committed error in denying his motion to that end. One of the alleged errors was as to the trial judge's instruction to the jury as to the amount of force a correctional officer may use to prevent a prisoner's escape from custody. As to this we need only say that we have considered the instruction and are satisfied that, taken as a whole, it correctly stated the law.

There remains for consideration appellant Diggs' other alleged ground for a new trial. This is that the trial judge erred in admitting evidence of plaintiff's prior criminal convictions for impeachment purposes. Over objection by Diggs' counsel, the trial judge permitted counsel for the defendants to prove on cross-examination of him that he had been convicted within 10 years from the date of trial of crimes of murder (two convictions), bank robbery, attempted prison escape and criminal conspiracy. In so doing the trial judge relied on Rule 609(a) of the Federal Rules of Evidence which he held to require the admission on the issue of credibility of evidence of convictions of felonies (crimes punishable by death or imprisonment in excess of one year) suffered by the witness within 10 years prior to trial. The trial judge held that the only exception to the mandatory nature of the rule, the balancing or weighing test which it contains, relates only to evidence which might be prejudicial to the defendant and therefore did not apply to evidence of prior crimes by a plaintiff witness. Moreover, the trial judge held that Rule 403 of the Federal Rules of Evidence, which permits the exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice was not applicable since it was not designed to override specific

rules, such as Rule 609, but rather to provide a guide for handling situations for which no specific rules have been formulated. Finally, the trial judge stated at trial and reiterated in the opinion of the district court denying a new trial that he would have admitted the evidence, even if possessed of the discretion to exclude it, because of its relevance to credibility, which was very important in the case, and because of the lesser prejudice to the plaintiffs arising from the fact that the jury knew they were incarcerated.

The appellant argues that the district court erred in construing Rule 609(a) as mandatorily requiring the admission of evidence of his prior felony convictions. We proceed, therefore, to consider the legislative history of Rule 609(a) in order to determine its nature and intended effect. Rule 609(a) as it was enacted by the Congress[1] is as follows:

> Rule 609. Impeachment by Evidence of Conviction of Crime
>
> (a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

[1] Act of Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1935.

The rule was the result of a long process of formulation. As originally drafted by the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States, it provided:

> For the purpose of attacking the credibility of a witness evidence that he has been convicted of a crime is admissible, but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted [commonly referred to as felonies] or (2) involved dishonesty or false statement regardless of the punishment [commonly referred to as crimen falsi].[2]

The Advisory Committee noted that the rule had been drawn in accordance with the congressional policy embodied in the congressional amendment of §14-305 of the District of Columbia Code made by the Act of July 29, 1970, P.L. 91-358, 84 Stat. 473. That act had followed the weight of traditional authority which allowed the use of felonies generally without regard to the nature of the particular offense and of crimen falsi without regard to the grade of the offense. It is thus quite clear that Rule 609(a) as originally formulated, adopted by the Supreme Court and submitted to the Congress was fully mandatory and left no area of discretion to the trial judge.

In the Congress diverging views developed. There were three schools of thought. (1) That evidence of all felonies and crimen falsi should be admitted without any weighing procedure. This was what had recently been enacted by the Congress for the District of Columbia. It represented the plan embodied in the rule as submitted to

[2] H.Doc. 46, 93d Cong., 1st Sess. (1973).

the Congress by the Supreme Court and it was urged in the House by Representative Hogan[3] and in the Senate by Senator McClellan.[4] (2) That evidence of crimen falsi should be freely admissible but that the weighing procedure should be applied in the case of felonies other than crimen falsi. This point of view was advanced by Representative Smith in the House.[5] It was adopted by the House subcommittee[6] but rejected by the House Judiciary Committee[6] and the House.[7] (3) That evidence of crimen falsi alone should be admissible. This view was advanced by Representative Dennis[8] and the House Judiciary Committee[6] and was the version adopted by the House which voted down positions (1) and (2).[7]

When the rule came to the Senate, the Judiciary Committee proposed a compromise.[9] With respect to defendants, only convictions of crimen falsi might be used. With respect to other witnesses, convictions of felonies might also be used subject to the balancing test. On the floor of the Senate Senator McClellan offered an amendment[4] providing for admission of all felonies and crimen falsi with no balancing test, in effect, the version originally prepared by the Advisory Committee and forwarded by the Supreme Court. Senator McClellan's amendment was adopted by the Senate.[10] Thus, the Conference Committee of the two houses was presented with a House draft permitting only crimen falsi to be admitted and a Senate draft which made all felonies freely admissible in addition to crimen falsi.

[3] 120 Cong. Rec. 2375.
[4] 120 Cong. Rec. 37075.
[5] 120 Cong. Rec. 2377.
[6] House Rep. 93-650.
[7] 120 Cong. Rec. 2381.
[8] 120 Cong. Rec. 2377.
[9] Sen. Rep. 93-1277.
[10] 120 Cong. Rec. 37083.

The present form of Rule 609(a) is the compromise between the two houses proposed by the Conference Committee. Its effect was to accept the McClellan amendment which the Senate had adopted, with the modification that the weighing test be applied to the admission of felonies but only with respect to the "prejudicial effect to the defendant". In their report the conferees on the part of the House stated:

> With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is out-weighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.[11]

[11] House Rep. 93-1597.

From the report it seems clear that it was the defendant in a criminal case the conferees had particularly in mind as to the balancing test. Both houses adopted the Conference Report[12] and the language it proposed is now the rule. Thus, the version of Rule 609(a) which finally passed and is now the law was substantially the same as the draft originally submitted by the Advisory Committee with the sole exception of the weighing clause with respect to possible prejudice to the defendant. In all other respects the final rule, just as the original draft, made all convictions of a witness for felonies and crimen falsi freely admissible.

As we have seen, the congressional attention seems to have been focused largely on criminal cases and the defendant in those cases. But the original rule drawn by the Advisory Committee and submitted by the Supreme Court had no such limitation. Its broad language applied to all cases, criminal and civil, in which witnesses testified in federal courts. And the legislative history makes it clear that the members of Congress recognized this. Thus, Representative Dennis in floor debate in the House on February 6, 1974 stated that the rule applies not only to a man who is a defendant in a criminal case but also to any witness.[13] And later in the debate Representative Hogan pointed out that the rule "applies in civil cases as well as criminal cases to all witnesses."[14] Representative Wiggins urged those who would be on the conference committee "to consider separating out the criminal problem from the civil problem and the nonparty witness situation from the case where the party is a witness,"[15] but this was never

[12] 120 Cong.Rec. 40070, 40897.
[13] 120 Cong.Rec. 2377.
[14] 120 Cong.Rec. 2379.
[15] 120 Cong.Rec. 2379.

done. Also in the same debate Representative Lott stated, "I think it is essential to recognize that this is a rule that would have application in both civil and criminal cases."[16] We find no suggestion in the legislative history by anyone that Rule 609(a) did not apply to civil cases and we think its general language compels the conclusion that it does apply to a civil case such as the one now before us.

The appellant urges that, nonetheless, Rule 403 of the Federal Rules of Evidence applies and authorizes the trial judge to weigh the danger of unfair prejudice to any witness against the probative value of evidence of prior felony convictions of the witness and that the trial judge erred in suggesting that, if he had that discretion, he would have exercised it in favor of admissibility. We, therefore, turn to consider the operation and effect of Rule 403.

Rule 403 provides:

> Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[17]

In *United States* v. *Wong*, 703 F.2d 65 (3d Cir. 1983), this court held that Rule 403 did not modify Rule 609(a) insofar as the latter required the admission of prior convictions of crimen falsi of a defendant who testified in his criminal trial. As to this we said (703 F.2d 67):

[16] 120 Cong.Rec. 2381.
[17] Act of Jan. 2, 1975, P.L. 93-595, §1, 88 Stat. 1932.

> As the First Circuit has recently noted, Rule 403 was not designed to override more specific rules; rather it was "designed as a guide for the handling of situations for which no specific rules have been formulated." *United States v. Kiendra*, 663 F.2d 349, 354 (1st Cir. 1981) (quoting Fed.R.Evid. 403 advisory committee note). Rule 609(a) is such a specific rule. It was the product of extensive Congressional attention and considerable legislative compromise, clearly reflecting a decision that judges were to have no discretion to exclude *crimen falsi*. *Id*. at 355.

[4] *Wong* involved a criminal case and evidence of convictions of crimen falsi while the present case is civil and involves evidence of convictions of felonies which were not crimen falsi. Thus, *Wong* is not direct authority here. But we think its rationale is equally applicable here. Rule 609 in mandatory terms requires the admission on the issue of credibility of evidence of prior convictions of felonies suffered within 10 years unless they might prejudically affect the defendant, in which case their probative value is to be weighed against that prejudicial effect. This language was thoroughly threshed out in the Congress and we are satisfied that it was the congressional intent that except in cases of possible prejudice to the defendant judges were to have no more discretion in admitting evidence of felony convictions than evidence of crimen falsi and that no distinction in this regard could be made between civil and criminal cases. In *United States v. Nevitt*, 563 F.2d 406, 408-9 (9th Cir. 1977), *cert. denied*, 444 U.S. 847, 100 S.Ct. 95, 62 L.Ed.2d 61 (1979); *United States v. Martin*, 562 F.2d 673, 680 n. 16 (D.C.Cir. 1977); and *United States v. Dixon*, 547 F.2d 1079, 1083 (9th Cir. 1976), all criminal cases, the courts upheld the mandatory admissibility

against prosecution witnesses (in the *Dixon* case a government informer called by the defense) of felony convictions which were not crimen falsi. Their rationale applies equally to the treatment under Rule 609(a) of plaintiff's witnesses in a civil case.

[5] In *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980), the court was presented with the issue whether Rule 403 operated to modify the mandatory provisions of Rule 609(a) but decided that it need not resolve that issue. In *Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983), and *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir. 1983), both civil cases, the courts, without considering the legislative history, decided, we think wrongly, that Rule 403 did operate to modify Rule 609(a). For the reasons already stated we decline to follow those cases. We accordingly hold that the district court in the present case rightly decided that Rule 609(a) compelled the admission of evidence of Diggs' prior convictions and that Rule 403 did not give discretionary authority to exclude them as prejudicial to the witness. We, therefore, have no need to consider the trial judge's suggestion that he would have admitted them in any event in the exercise of his discretion if he had been given such discretion.

One further thing needs to be said. As the legislative history discloses, the scope of Rule 609 has been and is the subject of widespread controversy and strongly held divergent views. We have felt compelled to give the rule the effect which the plain meaning of its language and the legislative history require. We recognize that the mandatory admission of all felony convictions on the issue of credibility may in some cases produce unjust and even bizarre results. Evidence that a witness has in the past been convict-

ed of manslaughter by automobile, for example, can have but little relevance to his credibility as a witness in a totally different matter. But if the rule is to be amended to eliminate these possibilities of injustice, it must be done by those who have the authority to amend the rules, the Supreme Court and the Congress. We, therefore, leave the problem to them. It is not for us as enforcers of the rule to amend it under the guise of construing it.

The judgment of the district court will be affirmed.

GIBBONS, Circuit Judge, dissenting:

The majority notes, correctly, that *United States v. Wong*, 703 F.2d 65 (3d Cir. 1983) (per curiam), is not dispositive of this appeal since there the court applied Fed.R.Evid. 609(a)(2) to admit evidence of prior *crimen falsi* convictions in a subsequent criminal case. In contrast, this case is a civil action involving the question of the admissibility of prior felony convictions under Rule 609(a)(1).

Rule 609(a) states:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Other courts of appeal have reviewed Rule 609 and concluded that the mandatory admission feature of prior

crimen falsi convictions does not apply to the admissibility of prior felony convictions in civil cases. *See Czajka v. Hickman*, 703 F.2d 317, 318 (8th Cir. 1983) ("Rule 403 . . . must be applied in civil cases when a party seeks to cross-examine another about criminal convictions."); *Shows v. M/V Red Eagle*, 695 F.2d 114, 118-19 (5th Cir. 1983) (civil case wherein Rule 403 modified Rule 609). *Cf. Furtado v. Bishop*, 604 F.2d 80, 93 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980) (court declined to resolve application of Fed.R.Evid. 403). The majority opinion creates a split among circuits by holding, for the first time, that in civil cases admission of prior felony convictions for the impeachment of any witness is mandatory. That result, placing use of such evidence outside the reach of the district court's discretion under Fed.R.Evid. 403, makes no sense whatever, for it mandates admission of such evidence against totally disinterested witnesses testifying, for example, about whether a light at an intersection was red or green.

The snippets of legislative history in which four Members of Congress anticipated that some court might reach so ridiculous a result, 120 Cong.Rec. 2377, 2379, 2381, do not persuade me that the result was intended by Congress. The overwhelming weight of the legislative background material on Rule 609 suggests a preoccupation by Senator McClellan and others with defendants in criminal proceedings. The result was, in my view, a legislative oversight as to the legislation's effect upon civil plaintiffs. By the time the oversight was recognized by Congressmen Dennis, Hogan, Wiggins and Lott legislative fatigue had set in, and the resulting ambiguity in Rules 403 and 609(a) was left unsolved.

Those courts which have considered whether Rule 609(a) evidence is, in civil cases, within the reach of the trial court's discretion under Rule 403 have taken the sensible approach of construing the rules reasonably, consistent with the "law and order" concerns of the proponents of extensive use of other crimes evidence. Nor did those courts, by eliminating the possibility of the patent injustices which can result from extending the mandatory application of Rule 609(a) to civil cases, invade the province of Congress. No matter which way these ambiguous rules are interpreted, Congress is free to change the interpretation by legislation. The realities of the legislative process are such, however, that congressional action will not be soon forthcoming, if at all. Meanwhile, in those circuits which have interpreted the two rules so as to achieve a reasonable accommodation in civil cases, that reasonable accommodation will stand. In this circuit, on the other hand, concededly bizarre results will be mandated by our rigid application of Rule 609(a) in civil cases which were not of real concern to Congress. Accordingly, I dissent.

OPPOSITION

BRIEF

No. 87-1816

In the Supreme Court of the United States

Term, 1987

PAUL GREEN,
Petitioner

vs.

BOCK LAUNDRY MACHINE COMPANY,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the Trial Court correctly interpreted and applied Federal Rule of Evidence 609 in allowing the several prior felony convictions of Paul Green to be used to impeach his credibility in a civil trial?

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STATEMENT OF THE CASE

On May 19, 1986, Paul Green commenced the action by filing a Complaint. Green sought compensatory damages for injuries he suffered as a result of using an allegedly defective water extractor manufactured by the Bock Laundry Machine Company ("Bock"), of Toledo, Ohio.

The machine in question was a Model M-100, Serial No. 9289, water extractor manufactured in 1965 and shipped directly to the Lemoyne Minit Car Wash, Lemoyne, Pennsylvania. The M-100 is a centrifugal device with a maximum rated speed of 1,725 r.p.m. designed to extract excess water from towels, sheets and other cloth items. The machine is designed in such a way that the power is not activated until a control arm is moved over the lid of the machine. This control arm cannot be moved until the lid is closed. Once the control arm is in the "on" position, a lug underneath the lid prevents the lid from being opened.

Once the handle is moved to the "off" position, the power cuts off and the primary lid lock is disengaged. As designed, the M-100 is equipped with a brake connected by a high tension spring to the control arm which activates upon moving the control arm from the "on" to the "off" position. The machine is further designed with a redundant safety interlock system. This feature is mechanical in nature and prevents the lid from being opened while the basket is spinning. Green's own expert admitted that, as designed, the machine was fail-safe.

The M-100 remained at the Lemoyne Minit Car Wash from the time that it was shipped from the Bock factory until the date of the accident. Little or no maintenance was performed on the machine. Further, it was obvious that, subsequent to the time that the machine left the possession of Bock, the brake mechanism as well as the mechanical safety interlock had been disconnected.

Paul Green began employment at the Lemoyne Minit Car Wash on approximately June 16, 1984. At the time, Mr. Green was an inmate at the Cumberland County Prison participating in a work release program. On June 23, 1984, Green was attempting to slow down the machine by wrapping a towel around his hand and pressing on the center spindle. The towel apparently became entangled causing his right arm to be traumatically amputated at the shoulder.

At trial, the owners of the car wash, Dolores and James Kelly, as well as three co-workers, Theresa Wissler, John Emerick and Martin Shetrom all testified that Green had been instructed prior to the accident to never place his hands into the machine while the extractor was moving. This testimony was offered to establish that Paul Green assumed the risk of any injuries that he sustained. In contrast, Green testified he observed others slowing the machine as he did.

Prior to the date of trial, Paul Green had been convicted of numerous criminal offenses, including criminal trespass, statutory rape, corruption of the morals of a minor, burglary and conspiring to commit burglary. The Trial Court admitted into evidence these prior convictions (except corruption of the morals of a minor) for the purpose of impeaching Green's credibility.

Green contended that the machine was defectively designed or had been designed with inadequate warnings. In response to special Interrogatories, the jury found that the machine was not defective as of the date of manufacture. The United States District Court for the Middle District of Pennsylvania, per The Honorable William Caldwell, denied Green's Motion for a New Trial. The United States Court of Appeals for the Third Circuit affirmed. Green now seeks a Writ of Certiorari solely on the issue as to whether the Trial Court properly admitted evidence of Green's prior criminal conviction.

SUMMARY OF ARGUMENT

The clear language of the Fed. R. Evid. 609 mandates the admission of prior felony convictions to impeach the credibility of a witness in a civil trial. Furthermore, the legislative history indicates that in civil cases, Congress intended for juries to receive as much information as possible on the issue of credibility, including evidence of prior felony convictions.

Moreover, This Honorable Court had proposed virtually an identical rule to the Congress. The rule proposed by the Supreme Court would have permitted the use of prior felony convictions to impeach all witnesses in civil and criminal proceedings, even the defendant who chose to testify on his own behalf in a criminal trial.

Last, Fed. R. Evid. 403 is inapplicable to the instant case. Green contends that regardless of Rule 609, a Trial Court may always exercise discretion and apply the "balancing test" of Rule 403 to exclude evidence of prior felony convictions. Nevertheless, Rule 403 is a general rule offered as guidance for situations in which no specific rule applies. Clearly Rule 609 is a specific rule thereby rendering Rule 403 inapplicable.

ARGUMENT

The Clear Language and Supporting Legislative History of Federal Rule of Evidence 609 Mandate the Admission into Evidence of Prior Felony Convictions To Impeach the Credibility of a Witness in a Civil Trial

At the time of trial, Paul Green was twenty-two years old. During his short adult life, he had been convicted of criminal trespass, statutory rape, corruption of the morals of a minor, burglary and conspiring to commit burglary. All of these crimes are punishable by imprisonment in excess of one year. *See*, 18 Pa. C.S.A. §§3503(a)(2), 1103(1)(2) (criminal trespass); 18 Pa. C.S.A. §3122, 1103(2) (statutory rape); 18 Pa. C.S.A. §§6301, 1104 (corruption of the morals of a minor); 18 Pa. C.S.A. §§3502(c), 1103(1) (burglary); and 18 Pa. C.S.A. §903 (criminal conspiracy).

Prior to trial, Green filed a Motion in Limine seeking to exclude any reference to the felony convictions. The Trial Judge, relying upon *Diggs v. Lyons*, 741 F.2d 577 (3d. Cir. 1984) *cert. denied*, 471 U.S. 1078, 85 L.Ed. 2d 513, 105 S.Ct. 2157 (1985), allowed the use of all of the prior felonies, except for the conviction for corruption of the morals of a minor. The Court ruled that under *Diggs*, it had no discretion to exclude such evidence. The Court *did not* state whether if it would have discretion, it would have excluded the evidence.

It is submitted that this decision was proper in light of the language and supporting legislative history of Federal

Rule of Evidence 609. The clear wording of the Rule indicates that prior felony convictions *shall* be admitted "for the purpose of attacking credibility" of a witness in a civil proceeding. Further, the legislative history indicates that it was this result that was intended. Moreover, virtually the identical rule was recommended by This Honorable Court.

In *Diggs*, a civil rights action had been brought alleging unconstitutional use of excessive force in preventing an escape from county prison and denial of access to legal assistance. On cross-examination, defense counsel established the prior criminal record of Charles Diggs, which consisted of convictions for murder, bank robbery, attempted prison escape and criminal conspiracy. The Trial Judge admitted such evidence for impeachment purposes.

On appeal, the Third Circuit affirmed. The Court thoroughly reviewed the legislative history and determined that Congress clearly intended for the admission of prior felony convictions to impeach the credibility of witnesses in civil proceedings. Furthermore, the Court noted that the First Circuit had reached a similar result, *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed. 2d 672 (1980) and several other Courts had held that in criminal cases witnesses, other than the defendant, could be impeached with evidence of prior convictions which were not crimen falsi. *See, United States v. Nevitt*, 563 F.2d 406 (9th Cir. 1977), *cert. denied*, 444 U.S. 847, 100 S.Ct. 95, 62 L.Ed. 2d 61 (1979); *United States v. Martin*, 562 F.2d 673 (D.C. Cir. 1977); *United States v. Dixon*, 547 F.2d 1079 (9th Cir. 1976).

A close review of the legislative history strongly supports the rationale of *Diggs*. Rule 609 and the accompanying notes are reprinted in their entirety in the Appendix. Originally, This Honorable Court recommended to Congress the adoption of Rule 609(a) as patterned after 14 D.C. Code §305(b)(1) which provided:

> For the purpose of attacking the credibility of a witness, evidence is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

Thus, it is clear that this Court favored the admission of prior felony convictions to impeach witnesses, even in criminal proceedings.

Despite the fact that in 1970 Congress had adopted the identical rule for use in the District of Columbia, extensive debate ensued regarding whether it should be adopted for use throughout the federal system. The version of Rule 609(a) adopted by the House of Representatives permitted impeachment only by convictions involving crimen falsi. When the matter proceeded to the Senate, the version forwarded to Congress by the Supreme Court was adopted.

The current Rule 609(a) is the product of a compromise formulated by a conference committee. The report of the House members of the Committee states,

> With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction

> is specifically the prejudicial effect to the defendant. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is out-weighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

This report was adopted by both Houses of Congress. *See*, 20 Cong. Rec. 40070, 40897.

Thus, the purpose of current Fed. R. Evid. 609(a) is to allow the trier of fact to have as much information as possible to assess the issue of credibility. If Paul Green had been a model citizen, holding a successful job and participating in community activities, there can be little doubt that he would have testified to such, thereby urging the jury to adopt his version of the facts due to his good living. A Defendant presented with such testimony will have little chance in seeking its exclusion. Conversely, a jury should be permitted to know if the Plaintiff has committed four felonies by the time he is twenty-two.

Last, Green contends that regardless of Rule 609, a Trial Court may always exercise discretion under Rule 403 to exclude evidence of prior felony convictions. The notes of Advisory Committee on Proposed Rules (reprinted in the Appendix) indicate that Rule 403 is "designed as a

guide for the handling of situations for which no specific rules have been formulated." Clearly Rule 609 is a specific rule and, therefore, Rule 403 is inapplicable. *See, Diggs v. Lyons, supra; Furtado v. Bishop, supra.*

In the instant case, the credibility of Paul Green was directly in issue. The accident occurred when Green placed his arm into a water extractor which was spinning at 1725 r.p.m. According to expert testimony, this was at approximately 70 m.p.h. In order to establish that Green assumed the risk of any injuries that he sustained, Bock presented the testimony of five witnesses who testified that Green had been instructed never to place his arm into the machine. Not only did Green deny receiving such warnings, he testified that several individuals advised him to use the machine as he was at the time of the accident. Clearly the credibility of the witnesses was in question. As such, Fed. R. Evid. 609 permits the use of prior felony convictions for impeachment. Consequently, the Trial Court properly admitted into evidence Green's prior convictions.

CONCLUSION

For all of the foregoing reasons and in light of the authorities cited therein, Respondent, Bock Laundry Machine Company, urges This Honorable Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,
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APPENDIX

Rule 609. Impeachment by Evidence of Conviction of Crime

(a) **General rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) **Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) **Effect of pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of

a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) **Juvenile adjudications.** Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) **Pendency of appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

(As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick §43; 2 Wright, Federal Practice and Procedure; Criminal §416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of §14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Luck v. United States*, 121 U.S.App.D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the Congressional policy manifested in the 1970 legislation.

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense. Provable convictions are not limited to violations of federal law. By reason of our constitutional structure, the federal catalog of crimes is far from being a complete one, and resort must be had to the laws of the states for the specification of many crimes. For ex-

ample, simple theft as compared with theft from interstate commerce. Other instances of borrowing are the Assimilative Crimes Act, making the state law of crimes applicable to the special territorial and maritime jurisdiction of the United States 18 U.S.C. §13, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, 28 U.S.C. §1865. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See 28 U.S.C. §1865, *supra*, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than one year.

Subdivision (b). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests—Current Trends, 89 U.Pa.L.Rev. 166, 176-177 (1940). This portion of the rule is derived from the proposal advanced in Recommendation Proposing in Evidence Code, §788(5), p. 142. Cal.Law Rev.Comm'n (1965), though not adopted. See California Evidence Code §788.

Subdivision (c). A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character. If, however, the pardon or other proceeding is hinged upon a showing of rehabilitation the situation is otherwise. The result under the rule is to render the conviction inadmissible. The alternative of allowing in evidence both the conviction and the rehabilitation has not been adopted for

reasons of policy, economy of time, and difficulties of evaluation.

A similar provision is contained in California Evidence Code §788. Cf. A.L.I. Model Penal Code, Proposed Official Draft §306.6(3)(e) (1962), and discussion in A.L.I. Proceedings 310 (1961).

Pardons based on innocence have the effect, of course, of nullifying the conviction *ab initio*.

Subdivision (d). The prevailing view has been that a juvenile adjudication is not usable for impeachment. *Thomas v. United States*, 74 App.D.C. 167, 121 F.2d 905 (1941); *Cotton v. United States*, 355 F.2d 480 (10th Cir. 1966). This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of *parens patriae*, the juvenile adjudication was considered to lack the precision and general probative value of the criminal conviction. While *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 18 L.Ed.2d 527 (1967), no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While *Gault* was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. 387 U.S. at 25, 87 S.Ct. 1428. See also Note, Rights and Rehabilitation in the Juvenile Courts, 67 Colum.L.Rev. 281, 289 (1967). In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding ju-

venile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice. See *Giles v. Maryland*, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967). Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 Wigmore §196; 3 *Id*. §§924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no discretion is accorded when the witness is the accused in a criminal case.

Subdivision (e). The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment. *United States v. Empire Packing Co.*, 174 F.2d 16 (7th Cir. 1949), cert. denied 337 U.S. 959, 69 S.Ct. 1534, 93 L.Ed. 1758; *Bloch v. United States*, 226 F.2d 185 (9th Cir. 1955), cert. denied 350 U.S. 948, 76 S.Ct. 323, 100 L.Ed. 826 and 353 U.S. 959, 77 S.Ct. 868, 1 L.Ed.2d 910; and see *Newman v. United States*, 331 F.2d 968 (8th Cir. 1964), *Contra, Campbell v. Unites States*, 85 U.S.App.D.C. 133, 176 F.2d 45 (1949). The pendency of an appeal is, however, a qualifying circumstance properly considerable.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 93-650

Rule 609(a) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(1), enacted in 1970. The Rule provided that:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

As reported to the Committee by the Subcommittee, Rule 609(a) was amended to read as follows:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not

the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, *i.e.*, crimes involving dishonesty or false statement.

Rule 609(b) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(2)(B), enacted in 1970. The Rule provided:

> Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.

Under this formulation, a witness' entire past record of criminal convictions could be used for impeachment (provided the conviction met the standard of subdivision (a)), if the witness had been most recently released from confinement, or the period of his parole or probation had expired, within ten years of the conviction.

The Committee amended the Rule to read in the text of the 1971 Advisory Committee version to provide that upon the expiration of ten years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment. The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible.

Rule 609(c) as submitted by the Court provided in part that evidence of a witness' prior conviction is not admissible to attack his credibility if the conviction was the subject of a pardon, annulment, or other equivalent procedure, based on a showing of rehabilitation, and the witness has not been convicted of a subsequent crime. The Committee amended the Rule to provide that the "subsequent crime" must have been "punishable by death or imprisonment in excess of one year", on the ground that a subsequent conviction of an offense not a felony is insufficient to rebut the finding that the witness has been rehabilitated. The Committee also intends that the words "based on a finding of the rehabilitation of the person convicted" apply not only to "certificate of rehabilitation, or other equivalent procedure," but also to "pardon" and "annulment."

NOTES OF COMMITTEE OF THE JUDICIARY, SENATE REPORT NO. 93-1277

As proposed by the Supreme Court, the rule would allow the use of prior convictions to impeach if the crime was a felony or a misdemeanor if the misdemeanor involved dishonesty or false statement. As modified by the House, the rule would admit prior convictions for impeachment purposes only if the offense, whether felony or misdemeanor, involved dishonesty or false statement.

The committee has adopted a modified version of the House-passed rule. In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence. Therefore, with respect to defendants, the committee agreed with the House limitation that only offenses involving false

statement or dishonesty may be used. By that phrase, the committee means crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit, or falsification bearing on the accused's propensity to testify truthfully.

With respect to other witnesses, in addition to any prior conviction involving false statement or dishonesty, any other felony may be used to impeach if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness.

Notwithstanding this provision, proof of any prior offense otherwise admissible under rule 404 could still be offered for the purposes sanctioned by that rule. Furthermore, the committee intends that notwithstanding this rule, a defendant's misrepresentation regarding the existence or nature of prior convictions may be met by rebuttal evidence, including the record of such prior convictions. Similarly, such records may be offered to rebut representations made by the defendant regarding his attitude toward or willingness to commit a general category of offense, although denials or other representations by the defendant regarding the specific conduct which forms the basis of the charge against him shall not make prior convictions admissible to rebut such statement.

In regard to either type of representation, of course, prior convictions may be offered in rebuttal only if the defendant's statement is made in response to defense counsel's questions or is made gratuitously in the course of cross-examination. Prior convictions may not be offered as

rebuttal evidence if the prosecution has sought to circumvent the purpose of this rule by asking questions which elicit such representations from the defendant.

One other clarifying amendment has been added to this subsection, that is, to provide that the admissibility of evidence of a prior conviction is permitted only upon cross-examination of a witness. It is not admissible if a person does not testify. It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.

Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over 10 years old, but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact. It is expected that, in fairness, the court will give the party against whom the conviction is introduced a full and adequate opportunity to contest its admission.

NOTES OF CONFERENCE COMMITTEE, HOUSE REPORT NO. 93-1597

Rule 609 defines when a party may use evidence of a prior conviction in order to impeach a witness. The Senate amendments make changes in two subsections of Rule 609.

The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness' credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.

The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

The House bill provides in subsection (b) that evidence of conviction of a crime may not be used for impeachment purposes under subsection (a) if more than ten years have elapsed since the date of the conviction or the date the witness was released from confinement imposed for the conviction, whichever is later. The Senate amendment permits the use of convictions older than ten years, if the court determines, in the interests of justice, that the probative value of the conviction, supported by specific

facts and circumstances, substantially outweighs its prejudicial effect.

The Conference adopts the Senate amendment with an amendment requiring notice by a party that he intends to request that the court allow him to use a conviction older than ten years. The Conferees anticipate that a written notice, in order to give the adversary a fair opportunity to contest the use of the evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved. In order to eliminate the possibility that the flexibility of this provision may impair the ability of a party-opponent to prepare for trial, the Conferees intend that the notice provision operate to avoid surprise.

1987 AMENDMENT

The amendments are technical. No substantive changes is intended.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

NOTES OF ADVISORY COMMITTEE ON PROPOSED RULES

The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, 5 Kan.L.Rev. 1, 12-15 (1956); Trautman, Logical or Legal Relevancy—A Conflict in Theory, 5 Van.L.Rev. 385, 392 (1952); McCormick §152, pp. 319-321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

Rule 403

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore §1849. Cf. McCormick §152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure §60-445, surprise is not included in California Evidence Code §352 or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n. Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

JOINT

APPENDIX

(3)

No. 87-1816

In the Supreme Court of the United States

Term, 198

PAUL GREEN,
Petitioner

vs.

BOCK LAUNDRY MACHINE COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

Joint Appendix

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Petition for Certiorari Filed May 4, 1988
Certiorari Granted June 20, 1988

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JOINT APPENDIX
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[Editor's note: reset from original including errata]

Cause

CV-86-0688

PLAINTIFFS
(Hbg.)
GREEN, PAUL

DEFENDANTS
BOCK LAUNDRY MACHINE COMPANY

CAUSE
(Cite the U.S. Civil Statute Under Which the Case Is Filed and Write a Brief Statement of Cause)

28 USC 1332 - Injury from Bock Water Extraction (Model M-100)

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HBG. OCT. 21, 1987

1986

May 22 1 Complt.— amsb
May 22 Notice—& consent form handed to counsel along with N/ACK form.
May 22 2 Summons—issued & handed to counsel for service upon deft. amsb
May 22 J.S. 5—Copy of docket to Judge Caldwell, Scranton, Courtran. amsb
June 11 3 Entry—of appearance of Thomas D. Caldwell, Jr. o/b/o deft. & C of S. gtg
June 16 4 Answer— amsb
of deft. to complt. (c/s)
July 9 5 Order—This case has been listed for a scheduling conf. on 9/26/86 at 10:00 am. cc: Melillo, Caldwell & Ct. w/letter Re: phone conf. tjk
July 11 6 Withdrawal—of appearance of Thomas D. Caldwell, Jr., Esq. o/b/o deft. AND
Appearance—of Richard B. Swartz, Esq. o/b/o deft. tjk
Aug. 19 (2) Return—of summons served upon deft. Bock Laundry Machine Co., 3600 N. Summit St., Toledo, Ohio 43601 by cert. mail on 5/20/86 & rec'd ack'd on 5/27/86. amsb
Sept 26 7 Min Sht.—of Scheduling Conf. gtg
Sept 26 8 Order —AND NOW, in connection with the scheduling conf. in this matter IT IS ORDERED THAT a) Disc. be completed within six (6) months of this order. b.) Mtns. for joinder of parties or for amendment of pleadings shall be filed w/in (30) thirty days of the date of this order. All other pre-trial motions shall be filed not later than the close of discovery. c.) this case shall be placed on

the May 1987 trial list of this Ct. Scheduling Order to follow. (CALD) cc: Melillo, Nealon, & Ct. gtg

1987

Feb 6 9 Order—This case has been placed on the May 1987 trial list with J/S to be held Monday, May 11, 1987 at 9:30 a.m. P/T conf. will be held on May 1987, in chambers, at 9:00 a.m. (CALD) cc: Melillo, Kearns, Ct. Ct. Rptr & Lois. gtg
Mar 18 10 Notice—of deposition by plaintiff of the President of Bock Laundry Machine Co., deft, on 3/24/87 at 2 PM in Harrisburg. af
Apr 24 11 Depo/Not —by pltf. of scheduled deposition of Delores Kelly on 4/29/87 at 2:00 p.m. at the Minit Car Wash, 9th & Market Sts., Lemoyne, Pa. 17043 & C of S. gtg
Apr 24 12 Depo/Not —by pltf. of scheduled deposition of James Kelly on 4/29/87, at 1:00 p.m. at the Minit Car Wash, 9th & Markets St., Lemoyne, Pa. 17043 & C of S. gtg
Apr. 27 13 Noitce —of plntf. to take the deposition of Theresa Wissler on 4/29/87 at 3pm. C/S tjk
May 4 14 Pre/Trial —of pltf. & C of S.
Memo gtg
May 4 15 Pre/Trial —of deft. Bock Laundry Machine Company & C of S. gtg
Memo
May 7 16 Min. Sht. —from ptc held on 5/7/87. Case ready for trial. js
May 7 17 Petn for Writ of HC—submitted by pltf's counsel AND js

May 8		Order —directing Warden @ CH SCI to produce pltf. Paul Green for hearing on 5/11/8 at 9:15 a.m. (Ctrm. # 1), Fed. Bldg., Hbg. (CALD) cc: Ct; Counsel; Warden at SCI Camp Hill; USM (info copy) js
May 11	18	Min. Sht. —of J/sel. & 1st day of trial. Jurors sworn. Plfs. calls witnesses. Video-tape shown to jury along w/excerpts from Emerick & Clemens' deps. Plfs. reads various interrogs. into the record. amsb
May 11	19	Jury Panel Record—8 jurors selectedamsb
May 11 (c/s)	20	Voir Dire Questions—proposed by plf. amsb
May 11	21	Motion—of plf. in limine. (c/s) amsb
May 11	22	Trial Memo.—of plf. (c/s) amsb
May 11	23	Points for Charge—of plf. (c/s) amsb
May 11	24	Trial Brief—of deft. amsb

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1987

May 12	25	Min. Sht.—of 2nd day of J/T. amsb
May 12	26	Oath—of stenographer, Maria Natale on 5/12/87. amsb
May 12	27	Points for Charge—of deft. amsb
May 13	28	Min. Sht. —of 3rd day of J/T. Jury returns verdict in favor of deft. & against the plf. Judgment to be entered. amsb
May 13	29	Verdict Slip —Has plf. shown by a fair preponderance of the evidence that the extractor manufactured by deft. in 1965 was defective when it left deft.'s control? NO. amsb
May 13	30	Exh. List—of plf. AND Receipt —of plf. rec'g all admitted exhs. amsb

May 13	31	Exh. List —of deft. AND Receipt —of deft. rec'g all admitted exhs. amsb
May 13	32	Verdict —AND NOW, this 13th day of May, 1987, pur. to jury interrogs., a verdict in this matter is entered in favor of the deft. & against the plf. (CALD) cc: Melillo, Nealon, Swartz, Crt., Security amsb
May 13	33	Judgment —IT IS ORDERED & ADJUDGED that judgment be & is hereby entered in favor of the deft. BOCK LAUNDRY MACHINE COMPANY & against the plf., PAUL GREEN. (CALD) cc: Melillo, Swartz, Nealon, Crt., Security amsb
May 13		J.S. # 6
May 18	34	U.S. Marshal's Return —of writ of habeas corpus ad test of Paul Green on 5/11/87; 5/12/87 & 5/13/87 from SCI-Camp Hill to U.S. Ct, Harrisburg, and rtn & was produced by state correctional officers. jes
May 14	35	Ct. Reporter Notes—of proceedings held on 5/12/87. n
May 22	36	Motion—of pltf for new trial, C of S. [illegible] n
May 29	37	Ct.Reptr Notes—of 5/11/87 jury sel. (M.Zamiska,reptr.) [illegible] r
May 29	38	Ct.Reptr Notes—of 5/11 thru 5/13 jury trial. (M.Zamiska,Rptr.) r
Jun. 16	39	Motion—of pltf to extend time for filing his brief in support of his motion for a new trial, and [illegible] n
" "		Order—for filing brief is extended to 7/2/87, (Caldwell) cc to counsel from Hsbg. n

[illegible]

Jul 9	40	Order—Pltf's time for filing his brief is ext by 10 days, in supp of mtn for new trial (Cald) c to parties from Hbg jm
July 10	41	Brief—of plft thru counsel in supp of mo for new trial & c/s. af
July 24	42	Transcript—of 5/11/87 Jury Selection. rk
August 4	43	Brief—(Filed 7/30/87) of deft in opp to pltf mot for new trial. jfg
Sept. 4	44	Memo & Order—pltfs motion for a new trial in matter is denied. (Cald) copies to counsel - ORIG. IN SECURITY.
Sept 11	45	Motion—of pltf for reconsideration and to permit pltf to submit relevant portions of the Court's charge to be evaluated in light of theparties' prior briefs [illegible] j
Sept 17	46	Memo—of pltf in supp of their mtn for reconsideration; c of s [illegible] j
Sep. 18	47	Memo—of deft in opp. to pltf's mot. for recon. r
Oct. ?	48	Not/Appl—of pltf from 9/4/87 order. COPY to USCA w/Docket copy & T.L.# 1. rk
		COPY to counsel & Ct. w/T.L.# 1. rk
Oct. 2		T.P.O.—to Pltf's Atty. from H. rk
Oct 8	49	Order—pltf's mtn for reconsideration filed 9/11/87 is denied (Cald) c to Melillo, Swartz Orig in Sec. jm
Oct. 13	50	T.P.O.—from Atty Melillo RE transcript is ordered of trial proceedings from 5/11/87 to 5/18/87. rkm
Oct. 16	51	Notice—from USCA RE Case is docketed at 86-0688. rkm

PLD12. . .Complaint Green. . .tld

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PAUL GREEN,

Plaintiff

v.

BOCK LAUNDRY MACHINE COMPANY,

Defendant

CIVIL ACTION
NO. CV-86-0688
JURY TRIAL DEMANDED
FILED
Harrisburg, PA
May 1 [illegible], 1986
Donald R. Berry
County Clerk

COMPLAINT

1. Plaintiff, Paul Green, is an adult individual and a citizen of the Commonwealth of Pennsylvania.

2. Defendant, Bock Laundry Machine Company, is a corporation organized under the laws of Ohio, with its principle place of business at 3600 North Summit Street, Toledo, Ohio, and is a citizen of that state.

3. Jurisdiction is based upon diversity of citizenship and the amount in controversy exceeds Ten Thousand ($10,000) Dollars.

4. On June 23, 1984, Paul Green was working at the Lemoyne Minute Car Wash in Lemoyne, Pennsylvania.

5. His job was to wipe cars dry after they were washed in the automatic washer.

6. While Mr. Green was using a water extractor machine to spin dry wiping cloths, he reached into the drum to help it come to a stop.

7. Mr. Green's right arm was caught and torn off by the rotating drum of the machine.

8. The machine in question is a Model M-100 Bock Water Extractor.

9. Upon examination, it was found that the stationary or outer drum of the machine in question had been badly abraded by the rotating inner or spin drum, and an opening approximately one-half inch wide had been torn through the bottom of the outer drum over twenty-five (25%) percent of its circumference.

10. This opening permitting water, extracted during the operation of the machine, to fall onto the drive and braking system and corrode the entire mechanism very badly.

11. As a result, the braking mechanism and the device intended to prevent the lid from opening when the drum is turning were both inoperative.

12 All of the damages hereinafter related are proximately caused by defects existing in said Bock Extractor at the time of its manufacture, which include the following:

(a) Said extractor was defective in that its construction was such as to permit the inner or spin drum to abrade the outer, stationary drum and wear an opening in the outer drum.

(b) The machine was defective because no fail-safe mechanism was in place to prevent operation of the machine when the safety mechanism became inoperative.

(c) The machine was defective because no warning notices about the need for routine inspection and maintenance and the danger of use when safety systems were inoperative were present.

(d) The machine was defective because no warning notices about the danger of placing hands in the moving machine was present.

(d) The machine was defective because its design dictated a cumbersome and expensive process in order to perform routine inspection of the safety systems.

13. As a result of the defects of said machine, Paul Green has been forced to incur medical bills, and will in the future be required to incur medical costs, and claim is made therefor.

14. As a result of the defects of said machine, Paul Green has in the past, and will in the future suffer a loss of earnings, and claim is made therefor.

15. As a result of the defects of said machine, Paul Green has suffered a loss of earning capacity, and claim is made therefor.

16. As a result of the defects of said machine, Paul Green has suffered a permanent disfigurement and claim is made therefor.

17. As a result of the defects of said machine, Paul Green has in the past, and will in the future suffer great

pain and suffering, loss of life's pleasures and enjoyments, and claim is made therefor.

18. As a result of the defects of said machine, Paul Green has in the past, and will in the future be subject to humiliation and embarrassment and claim is made therefor.

WHEREFORE plaintiff Paul Green prays for judgment against defendant Bock Laundry Machine Company in an amount in excess of Ten Thousand ($10,000) Dollars.

Respectfully submitted
ANGINO & ROVNER, P.C.
s/ Joseph M. Melillo,
Joseph M. Melillo, Esquire
I.D. No.
4503 North Front Street
Harrisburg, PA 17110
(717) 238-6791
Counsel for Plaintiff

May 19, 1986

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PAUL GREEN
vs.
BOCK LAUNDRY MACHINE COMPANY

CASE NUMBER: CV 86-0688

ANSWER

FIRST DEFENSE

1. The Complaint fails to state a claim against Defendant upon which relief can be granted.

SECOND DEFENSE

2. Defendant admits the allegations contained in Paragraphs 1—4 and in Paragraph 8 of the Complaint; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs 5—7, 9—11, and 13—18, and proof thereof is demanded; and denies that each and every other allegation contained in the Complaint.

THIRD DEFENSE

3. Plaintiff voluntarily and knowlingly assumed the risk of his injuries by putting his hand into the machine while it was still operating.

FOURTH DEFENSE

4. Plaintiff is barred in whole or in part from recovering in this case by the provisions of the Pennsylva-

nia Comparative Negligence Act, 42 Pa. C.S.A. §7102 et seq.

FIFTH DEFENSE

5. Plaintiff's injuries were caused by the Plaintiff's misuse of the machine and Plaintiff is therefore barred from recovery.

SIXTH DEFENSE

6. Plaintiff's injuries were caused as a result of the Plaintiff's disregard of warnings provided by the manufacturer, and Plaintiff is therefore barred from recovery.

Respectfully submitted,
CALDWELL & KEARNS
By Thomas D. Caldwell, Jr.
Thomas D. Caldwell, Jr.
112-114 North Second Street
P. O. Box 1164
Harrisburg, PA 17108
(717) 232-7661

IN THE UNITED STATES
DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA

PAUL GREEN,

Plaintiff

v.

BOCK LAUNDRY MACHINE
COMPANY,

Defendant

CIVIL ACTION — LAW
NO. CV-86-0688
JURY TRIAL DEMANDED

FILED
(illegible)

PLAINTIFF'S MOTION IN LIMINE

1. The Plaintiff, Paul Green, has within the last ten (10) years pled guilty or been convicted of criminal trespass, statutory rape, corruption of minors, burglary and conspiracy.

2. The conspiracy, burglary and statutory rape offenses are graded as felonies. The corruption of minor offense is a misdemeanor, while the criminal trespass conviction can be either a felony, a misdemeanor or even a summary offense, depending upon which subsection of 18 Pa.C.S.A. §3503 is found to be violated.

3. Pursuant to the Third Circuit's decision in *Diggs v. Lyons*, 741 F.2d 577 (1984), this Court has no discretion

in permitting evidence of the commission of felonies, within the past ten years, to impeach the Plaintiff's credibility.

4. Plaintiff believes, and therefore avers, that the Third Circuit's view is contrary to that of the other circuits and contrary to law and wishes to preserve this issue for appeal, although this Court is obviously bound by the Third Circuit's decision in *Diggs*.

5. Therefore, the Defendant may introduce evidence of all of Plaintiff's felony convictions, *i.e.*, statutory rape, conspiracy and burglary, although Plaintiff poses a continuing objection to the use of these kinds of crimes to impeach Plaintiff in a civil products liability action.

6. The defense may not introduce evidence of the misdemeanor, *i.e.*, corruption of minors and possibly criminal trespass pursuant to *Diggs*.

7. Criminal trespass and corruption of minors are not offenses crimen falsi.

8. Plaintiff may have been guilty of a criminal trespass felony, but there is no evidence of this of record, and if the defense wishes to impeach Plaintiff with this offense, it is obliged to produce a properly identified and exemplified court record of the offense.

9. Subsequent to his injury, Plaintiff developed some difficulties with substance abuse, growing out of his dependency upon drugs needed for the prevention of pain.

10. Any probative value which this information could possibly have is greatly outweighed by its prejudicial effect in a products liability case, and Plaintiff requests that the Defendant be ordered not to introduce evidence of this kind.

11. It is anticipated that the Defendant will offer factual testimony concerning supposed warnings given to Plaintiff about the use of the machine.

12. Under the law of Pennsylvania, contributory negligence is not a defense in a products liability action, and the defense of assumption of the risk requires the Defendant to prove both that Plaintiff was aware of the specific defect involved, and understood that he could suffer the kind of harm sustained by voluntarily encountering the defect.

13. Plaintiff does not believe that Defendant can produce this kind of evidence, and that the testimony of these fact witnesses should be restricted.

14. Plaintiff intends to ask for an offer of proof on each of these witnesses.

15. Plaintiff has briefed the legal requirements for proving assumption of the risk in his Trial Memorandum.

WHEREFORE, Plaintiff prays that the Court restrict the Defendant's right to introduce evidence of Plaintiff's criminal conduct, of his substance abuse and of the testimony of certain fact witnesses in accordance with the above Motion in Limine.

Respectfully submitted,
ANGINO & ROVNER, P.C.
s/ Joseph M. Melillo
Joseph M. Melillo
I.D. No. 26211
4503 North Front Street
Harrisburg, PA 17110-1799
(717) 238-6791
ATTORNEYS FOR PLAINTIFF

Dated: May 11, 1987

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PAUL GREEN,

Plaintiff

vs.

BOCK LAUNDRY MACHINE COMPANY,

Defendant

CV 86-0688

TRIAL BRIEF OF DEFENDANT,
BOCK LAUNDRY MACHINE COMPANY

I. EVIDENCE TO BE PRESENTED.

The machine in question is a Model M-100, Serial No. 9289, water extractor manufactured by the Bock Laundry Machine Company ("Bock") of Toledo, Ohio. The machine was manufactured in 1965 and shipped on December 22, 1965, directly to the Lemoyne Minit Car Wash, Ninth and Market Streets, Lemoyne Pennsylvania. The M-100 is a centrifugal device with a maximum rated speed of 1,725 r.p.m. designed to extract excess water from towels, sheets and other cloth items. Thomas M. Clement, President of Bock Laundry, will testify regarding the operation and safety features of the M-100. The machine is designed in such a way that the power is not activated until a control arm is moved over the lid of the machine. This control arm cannot be moved until the lid is closed. Once the control arm is in the "on" position, a lug underneath the lid prevents the lid from opening.

* * * * *

. . . the accident, he observed Paul Green sticking his arm into the M-100 and likewise instructed him not to do it. Dolores Kelly, owner of the car wash, will also testify that she observed Paul Green sticking his arm into the machine and instructed him not to do so.

Testimony will indicate that the only maintenance performed on the machine was a one time lubrication of the engine done by John Emerick. This was performed sometime after January of 1984 but prior to the accident. At that time, Mr. Emerick completely disassembled the machine. He does not recall a gash in the curb. Mr. Kelly will testify that the only repair ever made was the replacement of the electrical plug.

II. ANTICIPATED EVIDENTIARY ISSUES.

A. *Admissibility Of Paul Green's Prior Criminal Conduct.*

At the time of the accident, Paul Green was an inmate at the Cumberland County participating in a work release program. In his deposition, Paul Green admitted that at that time, he was serving a 5 to 23 month sentence for criminal trespass. Under the Pennsylvania Crimes Code, criminal trespass is a felony of the second degree and may be, under certain circumstances, a felony of the first degree. *See,* 18 Pa. C.S.A. §3503(a)(2). A felony of the second degree is punishable by imprisonment of not more than 10 years and a felony of the first degree is punishable by imprisonment of up to 20 years. *See,* 18 Pa. C.S.A. §1103(1) and (2). Paul Green further admitted in his deposition that subsequent to this accident, he was convicted of statutory rape and corruption of the morals of a minor. Statutory rape is a felony of the second degree, 18 Pa. C.S.A. §3122, and is therefore punishable by imprisonment of up to 10

years. Corruption of the morals of a minor is a misdemeanor of the first degree, 18 Pa. C.S.A. §6301, and is punishable by imprisonment of up to five years. 18 Pa. C.S.A. §1104(1). Paul Green is presently serving two consecutive one to four year sentences for being convicted of burglary and conspiracy subsequent to the accident. Burglary is a felony of the first degree, 18 Pa. C.S.A. §3502(c), punishable by imprisonment of up to 20 years. 18 Pa. C.S.A. §1103(1). The Pennsylvania Crimes Code provides that conspiracy is of the same degree as the most serious offense which is the object of the conspiracy. 18 Pa. C.S.A. §905(a). The conspiracy conviction is related to the burglary offense and, as such, would be a felony of the first degree.

Bock contends that all of the above-described offenses committed by Paul Green are admissible. Paul Green's credibility is directly an issue in this action. It is anticipated that Paul Green will testify that at no time did any individuals instruct him not to place his arm into the M-100 and, in fact, other employees were operating the machine the same way that he did. Fed. R. Evid. 609(a) provides,

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public records during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law in which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

All of the above-described offenses are potentially punishable by more than one year in prison and, as such, are admissible under Rule 609(a)(1). In *Diggs v. Lyons*, 741 F.2d 577 (3d. Cir. 1984) *cert. denied*, 571 U.S. 1078, 105 S. Ct. 2157 (1985), the Third Circuit ruled that the only consideration under Rule 609(a) is whether the crime is punishable by more than one year in prison and has been committed within the last ten years. In *Diggs*, a civil rights action had been brought alleging unconstitutional use of excessive force in preventing the plaintiff's escape from county prison and alleging denial of access to legal assistance. Plaintiff Diggs had testified and on cross-examination, the defense elicited his prior criminal record which consisted of convictions for murder, bank robbery, attempted prison escape and criminal conspiracy. The trial judge admitted such evidence for impeachment purposes. On appeal, the Third Circuit Court affirmed.

After a thorough review of the legislative history of Rule 609(a), the Court determined that it was clearly the intent of the drafters of the Federal Rules of Evidence that all crimes punishable by more than one year in prison, regardless of the nature of offense, are admissible for impeachment purposes. The Court further determined that the trial judge has no discretion regarding the admissibility of such evidence specifically finding that Federal Rule of Evidence 403 was inapplicable.

Paul Green has been convicted of criminal trespass, statutory rape, corruption of the morals of a minor, burglary and criminal conspiracy. Under the laws of Pennsylvania, all of these offenses are punishable by imprisonment of more than one year. Therefore, such should be admissible since Paul Green's credibility is directly an issue in the instant action.

B. Admissibility of ANSI Z8.1 Standards.

At the time that the M-100 involved in this action was manufactured, the American Standards Association had developed a safety code for laundry machinery and operations. The standards, ANSI Z8.1, have been amended and are presently codified at 29 C.F.R. §1910.262(y)(1). Gene Litwin, Bock's

• • • • •

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PAUL GREEN,

Plaintiff

vs.

BOCK LAUNDRY MACHINE COMPANY,

Defendant

CIVIL ACTION NO. 86-0688

FILED
MAY 13, 1987
s/ [illegible]

VERDICT

AND NOW, this 13th day of May, 1987, pursuant to jury interrogatories, a verdict in this matter is entered in favor of the defendant and against the plaintiff.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

PAUL GREEN,

Plaintiff

v.

BOCK LAUNDRY MACHINE COMPANY,

Defendant

JUDGMENT IN A CIVIL CASE
CASE NUMBER: CIVIL NO. 86-0688

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT JUDGMENT BE AND IS HEREBY ENTERED in favor of the defendant, BOCK LAUNDRY MACHINE COMPANY and against the plaintiff, PAUL GREEN.

FILED
May 13, 1987
[illegible]

APPROVED: s/ William W. Caldwell
William W. Caldwell
U.S. District Judge

Date May 13, 1987
[illegible]

Donald R. Berry, Clerk
Clerk
s/ Ann M. [illegible] Brown
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PAUL GREEN,

Plaintiff

v.

BOCK LAUNDRY MACHINE COMPANY,

Defendant

CV-86-0688

TRANSCRIPT OF PROCEEDINGS

JURY TRIAL

Before: Hon. William W. Caldwell, Judge
and a Jury
Date: May 11, 12, 13, 1987
Place: Courtroom No. 1
Federal Building
Harrisburg, Pa.

COUNSEL PRESENT:

JOSEPH M. MELILLO, Esquire
For - Plaintiff

JAMES NEALON, Esquire
RICHARD SWARTZ, Esquire
For - Defendant

Monica L. Zamiska, RPR
Official Court Reporter

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THE COURT: Is the jury satisfactory to the litigants?

MR. NEALON: Yes, Your Honor.

MR. MELILLO: Yes, Your Honor.

THE COURT: All right. Please swear the jurors.

(The jury was sworn in at 11:00 a.m.)

THE COURT: Ladies and gentlemen, we're going to begin the case now. The attorneys will make their opening statements to you to give you an overview as to what this case is all about.

What the attorneys say to you is not evidence that you can consider in arriving at a verdict, but it is a very helpful

phase of the case, because it informs you as to what the parties hope to show by the evidence.

Gentlemen, if it's okay with you we won't record your openings. I don't see any need to do that in any case.

MR. MELILLO: That's fine with me.

MR. NEALON: Okay.

THE COURT: Does the plaintiff wish to proceed then, Mr. Melillo?

(Mr. Melillo made an opening statement. Mr. Swartz made an opening statement.)

THE COURT: Ladies and gentlemen, we will start the testimony in just a moment. I want to speak to counsel for a moment out of your hearing. So if you will indulge us for just

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a second.

Gentlemen, will you come up.

(A discussion was held off the record at side bar.)

THE COURT: All right.

MR. MELILLO: Call Mr. Paul Green to the stand.

PAUL EUGENE GREEN, called as a witness, being duly sworn, testified as follows:

THE CLERK: Would you state for the record your full name, please, sir.

THE WITNESS: Paul Eugene Green.

MR. MELILLO: Your Honor, may I question the witness from the bar or would Your Honor prefer that I sit?

THE COURT: Right here you mean?

MR. MELILLO: Yes.

THE COURT: Yes, you may come up.

DIRECT EXAMINATION

BY MR. MELILLO:

Q Mr. Green, where do you currently reside?

A SCI, Camp Hill.

Q You are going to have to keep your voice up so all the jurors can hear you. Okay?

A Okay.

Q And I'll try to do the same.

MR. MELILLO: If, Your Honor, if I might mention, Your Honor, I sometimes have a low voice, and the jurors might

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not be able to hear me. So that you speak up if you can't—

THE COURT: Just signal us. The air movement in here creates a noise.

MR. NEALON: Mr. Milello, would you just stand so I am not blocked.

THE COURT: Begin again, counselor.

BY MR. MELILLO:

Q How long have you been in prison currently, Mr. Green?

A A little over a year.

Q Now at the time—let me go back. Where are you from originally?

A Newville.

Q And when were you born?

A May 10, 1965.

Q How old does that make you right now?

A I turned twenty-two yesterday.

Q Did you go to school in Newville?

A Yeah.

Q What school did you attend?

A Newville Elementary and Big Springs High.

Q How many grades did you complete of Big Springs High?

A Eight.

Q Did you have any education after that?

A No, just on the job.

Q Did you ever get a degree?

A No. I got a GED, though.

Q What's your understanding of what a GED is?

A It's like a diploma. You went to school to get it.

Q When did you get that?

A In '84.

Q Were you in prison at the time?

A Yes.

Q Do you have any family in Newville?

A Yeah, my mother and father, brothers and sister.

Q I am having a little trouble hearing you. Could you speak up.

A My mom and dad and brothers and sister live there.

Q How many brothers and sisters do you have?

A Two brothers and one sister.

Q Can you tell the jury what you did after you left school in terms of jobs?

A I got a job to get out of school.

Q What kind of job was that?

A At McDonald's.

Q McDonald's, and what other kind—what kind of jobs did you do?

A I worked in pizza places and done a lot of work for myself working around town on people's houses and stuff. I worked for a guy down in Mount Holly on cars, done jobs.

Q Before you went into prison did you have any experience

dealing with laundry-type machines?

A No.

Q Now you were in prison in June of 1984 in Cumberland County, is that correct?

A Yes.

Q When had you started in prison there?

A You mean started work?

Q When did you enter that prison?

A March 2.

Q And were you given some kind of work release assignment?

A Yes.

Q Can you tell the jury how you managed to get work release?

A Well, on your behavior and whether they trust you or not, you go through a trusty program there within the institution. And then if they think, you know, that you're capable of a job, they'll give you a work release job depending on whether your behavior was good.

Q And when did you start on the Work Release Program?

A I don't recall the date.

Q What was your first job on that program?

A Lemoyne Car Wash.

Q Do you recall how many days you were there before the accident?

A About six.

Q About six days.

And when you started there what kind of jobs were you given to do?

A First I was outside. When cars come out of the building, I'd dry them off.

Q Okay, and what other jobs were you given to do?

A Then I had to go inside the car. I was cleaning up the interior of cars and washing cars outside and then moved inside work, worked the water extractor.

Q Was the water extractor part of the laundry operation for towels?

A Yes.

Q Can you tell the jury what kind of equipment was at the Lemoyne Minit Car Wash and what you had to do?

A Well, there was a machine that you run it through and when it comes outside, you would dry them off. But when they got done drying the cars, they threw the towels in a basket, a big bin like, and then I had to take them out of there and in the washroom and put them in the machine.

Q The washing machine was the first machine you'd put them in?

A Yes.

Q How long would the washer take?

A The washing machine about five minutes.

Q What would you do with the towels after they had been

finished with the washing machine?

A Put them in the water extractor.

Q Can you tell the jury how would you operate the water extractor?

A I moved the arm over and lift the lid and put the towels in it.

Q Then what would you do?

A Then had the lid in for about a minute or two and then you move the arm out of the way and lift the lid and take them out.

Q Was there anything that would stop you from lifting the lid while the machine was spinning?

A Just the arm.

Q Once you moved the arm away you could lift the lid?

A Yes.

Q Did you see any warning stickers on that machine?

A No.

Q Do you remember anything that was written on that machine?

A No.

Q Now after you finished with the water extractor where would the towels go?

A Back outside.

Q Would they go into any other piece of equipment first?

A They went into a drier and then outside.

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Q [illegible] Mr. Green, do you have any idea how often those machines would be used when the car wash was in operation?

A Constantly.

Q Constantly.

Do you have any idea how many towels that car wash needed per day?

A Sometimes you do a couple hundred cars a day. So you're talking a couple thousand towels.

Q Do you know yourself how long it could take to take a wet towel that's dirty and make it into a dry clean towel?

A I don't know.

Q Who trained you on the use of the extractor?

A A guy that worked inside with me.

Q Was he a prisoner also?

A Yeah.

Q What was his name?

A Bobby Shetrom.

Q Do you know if he is also known as Martin Shetrom?

A I believe that's his real name.

Q What did he tell you how to use the extractor?

A He showed me how to put the towels in. First I just watched them guys work it.

Q What guys did you watch?

A A guy named—Long was the last name, it was Long, and Mr. Shetrom.

12

[illegible] did you learn from watching them on how to use the extractor?

A The way they got them out. There was a ball in there. They stuck a dry towel in their hand, stuck it down on the ball, applied pressure, and it slowed it down a great deal. You could hold it there until it stopped.

Q Would you try to do that as soon as you had turned off the power or would you wait awhile?

A As soon as you'd lift the lid and stuff you could stand there a minute or two and it would still be spinning real fast. So that's why they used their hand to put [illegible] to the towel.

MR. NEALON: Mr. Melillo, I'm sorry to bother you, but I can't—

MR. MELILLO: Maybe I will position myself over here. Is that better?

MR. NEALON: Yes, thank you very much.

BY MR. MELILLO:

Q Mr. Green, who else taught you on the use of the equipment at the car wash?

A Just Bobby Shetrom and that Mr. Long.

Q Any other people tell you—teach you how to use any of the other equipment at all that you remember?

A No.

Q Now on June 23, 1984 can you tell the jury how you were

[illegible]

A I was—it was in the morning sometime, and I put my hand on this ball to slow it down, and then I don't recall

what happened. And when I woke up after that, I was in the hospital.

Q Do you have a—strike that. What can you tell the jury about the need for towels at the car wash and how that affected, if at all, the way you operated the machine?

A Well, the constant need of towels that they needed them in a hurry because there is cars backed up clean to this main road up there. And cars coming through rather quick, and the need for towels is they need them.

Q I'm sorry, would anybody say anything to you when they were running low on towels?

A Yeah, they'd yell towels up. And I just started there and, you know, they'd be yelling hurry up, get the towels out of here.

Q These were the various people who worked there?

A Yeah.

Q. How many people were there from the prison besides [illegible) that time, do you know?

A I would believe there was me and two or three other people.

MR. MELILLO: That's all right now. Thank you.

THE COURT: All right.

CROSS EXAMINATION

BY MR. NEALON:

Q Mr. Green, do you know Delores Kelly?

A Is that Miss Kelly, the owner?

Q Miss Kelly, the co-owner of the car wash.

A Yes, I know her.

Q She was the one that hired you, wasn't she?

A Yes.

Q And she instructed you to some extent concerning the general operation of the car wash, didn't she?

A Yeah.

Q And didn't she tell you not to put your arm into the machine while the basket was spinning?

A No.

Q Didn't she tell you not to put your arm into the machine until it came to a complete stop?

A No.

Q Do you know James Kelly?

A Yeah.

Q. Mr. Kelly?

[illegible]

Q He's the co-owner of the car wash also, isn't he?

A Yeah.

Q Did Mr. Kelly ever see you using the machine prior to this accident?

[illegible] don't know. The whole time I was down there I only seen Mr. Kelly like once.

Q Mr. Kelly told you not to put your arm in the machine, didn't he?

A No.

Q Do you know John Emerick?

A Yeah, I know John.

Q He was a fellow employee of yours, wasn't he?

A Yeah.

Q He was also in Cumberland County Prison at the time with you, wasn't he?

A Yes.

Q He instructed you how to use the machine, didn't he?

A No.

Q Didn't Mr. Emerick tell you not to put your arm in the machine?

A Mr. Emerick worked clean in the back of the car wash when the cars first come in. He was never up front.

Q He never saw you using the machine?

[illegible] only time he come up front was to eat or buy [illegible] to drink.

Q He instructed you not to put your arm in the machine, didn't he?

A No.

Q Martin Shetrom you indicated did train you how to use

[illegible] machine, didn't he?

A Yes.

Q Martin Shetrom was also a prisoner at the Cumberland County Prison, wasn't he?

A Yes.

Q He was a fellow employee of yours, wasn't he?

A Yes.

Q While he was instructing you didn't he tell you not to put your arm into the machine while the basket was spinning?

A No.

Q Theresa Wissler was your supervisor, wasn't she?

A Theresa, she just—I don't think she was the supervisor, but I know her, yes.

Q On this day in question in fact it wasn't a busy day, was it?

A Yeah, it was busy.

Q There were less than a hundred cars that went through the car wash on this day, isn't that true?

A It was early in the morning. We just opened up when my accident occurred about ten o'clock. We were only open a couple hours. I don't know if it was busy that day or not.

Q You are saying the accident happened at ten o'clock in the morning?

A Somewhere roughly around there.

Q Weren't you—weren't most of the employees doing what

was called side work where you were cleaning up the car wash?

A No.

Mrs. Kelly wasn't even there, was she, at the time of the accident?

A No.

Q Because it was a slow day?

A Miss Kelly is barely ever there.

Q You are saying Miss Kelly is never there?

A She's there but she's not there like a boss should be. She's rarely there.

Q Who was there who was your supervisor?

A I suppose Theresa.

Q So Theresa was your supervisor?

A I don't know if that was her job as a supervisor. I seen her working just like the other people work. I didn't know she was a supervisor.

Q During the first time that you used the extractor didn't Theresa Wissler specifically tell you that the machine could tear your arm off?

A No.

Q You indicated that you thought this operation took a couple thousand towels a day.

A Yeah.

Q Do you know how many they started with at the beginning of the morning?

A There was a big bin full of towels.

Q Do you know how many were in there?

A No, I don't.

Q How many towels were used on a car?

A It was like three or four people drying and a towel in each hand.

Q So that would be six to eight towels per car?

A Yes.

Q And if there were less than a hundred cars done on a day, you would only need six to eight hundred towels, is that correct?

A Yes.

Q Now you indicated that sometimes people said hurry up, get towels out?

A They'd yell towels up.

Q Did anybody say put your arms in and slow that extractor down?

A No. Bobby Shetrom, he showed me how to use it, yes. I noticed from them guys working on it how they slowed it down.

Q Did anybody say when they said hurry up, towels up slow that extractor down?

A Well, when they said towels up, they wanted me to get the towels out there in a hurry.

Q Did they say put your arm in to slow it down?

A No.

Q Mr. Green, you are presently incarcerated at Camp Hill, aren't you?

A Yes.

Q You are serving consecutive sentences of one to three years for burglary and conspiracy, are you not?

A Yes.

Q And at the time of this accident you were in Cumberland County Prison, were you not?

A Yes.

Q Now, Mr. Green, you indicated that you had no formal training regarding the operation of the laundry machine, is that correct?

A That's correct.

Q But you've worked on cars a lot, haven't you?

A Yes.

Q In fact, you at times worked for other people on their cars, didn't you?

A Yes.

Q And you charged them parts plus labor, did you not?

A Yes.

Q So you were somewhat of a mechanic on cars, were you not?

A Yes.

Q You would never place your hand in the moving parts of a motor vehicle, would you?

A No.

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MR. NEALON: No further questions at this time.

THE COURT: All right.

MR. MELILLO: I have just a couple questions. One or two questions on redirect.

REDIRECT EXAMINATION

BY MR. MELILLO:

Q Mr. Green, you just testified that when they would say towels up they wouldn't tell you to put your hands in the machine, is that correct?

A Yes.

Q Was it your testimony, though, that people either showed or told you how to do that?

A Yes.

MR. MELILLO: That's all. Thank you.

THE COURT: That's all right now. Thank you, Mr. Green.

THE WITNESS: You're welcome.

MR. MELILLO: Mr. James Kelly, if he's here.

JAMES ARNOLD KELLY, called as a witness, being duly sworn, testified as follows:

THE CLERK: Would you state for the record your full name, please, sir.

THE WITNESS: James Arnold Kelly.

THE CLERK: The spelling of your last name?

THE WITNESS: K-e-l-l-y.

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THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. MELILLO:

Q Mr. Kelly, where do you currently reside?

A Camp Hill.

Q How long have you been a resident of Camp Hill?

A About eleven years.

Q And when did you get into the car wash business?

A Approximately '68 or '69.

Q And can you tell me how you came to get into the car wash business?

A Well, my father owned it before I did, and he wanted to sell it, so I said I'll buy it.

Q Was this the Lemoyne Minit Car Wash?

A Right.

Q Where is that, Ninth and Market Street in Lemoyne?

A Right.

Q When had your father started in the business?

A '62.

Q Do you know when he acquired the business what equipment he had with it?

A No. There was hardly any equipment. He bought most of the equipment.

Q He bought most of it?

A Yes. They used to hand wash them when the cars came

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through.

Q Hand wash what?

A They had four men back there instead of the brushes and that, and they washed their cars after it was hooked to the conveyor.

Q What was the reason you took over the business in 1968 or 1969?

A He wanted to sell it.

Q Was he retiring?

A He retired at sixty-two from Stroehmann's and he bought it and he wanted to retire and go to Florida.

Q Now when you took over the business what equipment for laundering or drying towels was with it?

A I think there was one washing machine extractor and maybe two driers.

Q What kind of extractor was there?

A Bock.

Q Was it a Bock M-100?

A I don't know what number it was.

Q Was it the same extractor that you had until the date of this accident June 23 of 1984?

A Yes.

Q I'm going to hand you what's been marked as Plaintiff's Exhibit No. 51, which is an invoice from Bock Laundry Machine Company for an M-100, and just ask you if in fact this invoice

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[illegible] that the extractor was shipped to your business address?

A I guess. I guess that's where he bought it. I don't know where he bought it from.

Q What's the address that it was shipped to?

A Ninth and Market Street, Lemoyne.

Q Is that your business at the Minit Car Wash?

A Right.

Q What's the date of shipment on there? Can you see it up on the upper right-hand portion of the invoice?

A Is that it? December, it's all faded out, '65.

Q December of 1965?

A Right.

Q So if that's correct, the extractor would have been at the car wash for approximately three years before you took over the business?

A Yes, approximately.

Q Now when you took over did the extractor have any kind of braking mechanism on it?

A No, it worked the same. All those years it worked the [illegible] way.

Q Why don't you tell me how you would start the machine?

A Just put the towels in, push them down. Because if you didn't push them down, they would come out of the top and go behind the basket. Pull the lid over, I mean hand over, and

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it would start.

Q How long would you let it run for?

A Not too long, a minute, maybe two minutes, until the water stopped coming out of it.

Q Where would the water come out?

A It has about an inch and a half exhaust on the side.

Q A drain, in other words?

A Yes.

Q The water would come out of there?

A Right.

Q Did the water ever appear to you to be leaking out from under the machine?

A The only time it would come out of the bottom is when a towel was caught down in and stopped the exhaust.

Q What would you do then?

A Then you have to unscrew the band that went around the lid, take the lid off, reach down in and take the towel out. Sometimes you had to take the drum out.

Q It is your testimony otherwise the water came out of the [illegible]

A Yes.

Q By the way, was the car wash floor frequently or usually damp or wet?

A It is always wet.

Q Why is that?

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A It is a car wash.

Q Obvious question, obvious answer.

It would be wet for various reasons around where you keep the extractor?

A Yes, water dripping off of cars and—

Q Okay. Now was it your testimony that you would turn it off by moving the handle away from the lid?

A Right.

Q That would deactivate the power?

A Right.

Q At that point if you wanted to could you open the lid?

A You could but they were advised not to.

Q I wanted to know if you could. Could you?

A Yes.

Q There would be nothing to stop the lid from opening?

A No.

Q If at that point you opened the lid would the basket still be spinning?

A Yes.

Q About how long would it take before that basket came to a stop?

A Until you put one load of wash in, put them in the extractor, that would just about be finished. You could take it out.

Q Do you happen to know how long the basket would keep

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spinning after you turned the power off the extractor?

A I never timed it, maybe ten minutes.

Q Maybe ten minutes?

A Maybe more, I don't know.

Q If it were twenty minutes, would that coincide with your recollection?

A I don't think it would take that long.

Q Now was there ever anything on the machine that you can remember which indicated that it was supposed to have some kind of brake?

A No.

Q Was there ever anything on the machine that you can remember that indicated that the lid is not openable until the machine has stopped?

A No.

Q Was there anything on the machine that you can remember that indicated that it had some kind of safety interlock feature?

A No.

Q When you acquired the business did you get any manual or paper with the machine?

A Wasn't no paper at all on it.

Q Do you know if your father had any paper?

A I couldn't tell you that.

Q When you got it there wasn't anything on it?

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A No.

Q Was anything on the machine that told you about the need to maintain the machine?

A No.

Q What was your understanding of the maintenance required for the machine?

A I figured as long as it worked, it worked for twenty some years like that. No problems. The only problem we ever had was the plug on the wall went out and the electric and replaced it.

Q You had an outside electrician come in to fix that?

A Yes.

Q Did he test it, see if it worked okay?

A Worked all right.

Q Did he tell you whether the machine had any defects or problems?

A No.

Q Up until the time this accident happened were you ever aware that there was any safety feature that might be missing from this machine?

A No.

Q Did you ever have the machine all the way apart?

A No.

Q Never?

A Just take the drum out to remove the towel, that's all.

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Q If you wanted to get at the interworkings of the machine do you know what you would have had to do to perform that test?

A No.

Q You have no idea?

A Couldn't tell you.

Q Do you know how much the basket weighed?

A Well, it would take one strong man could lift it out, but we used two.

Q You used two?

A It was heavy.

Q Let me ask you a little bit about the operation of your business. How did the car wash actually work? The car came in. What would happen to it?

A The owner of the car would drive it in, put it in neutral, let the brake off, turn the motor off.

Two men would get the white side walls clean on the tires. Vacume it out. Hook the chains on it, send it through. They would use high pressure guns on the front end, side and back end on it. Go through the brushes, the

blower, the dry—well, when we did have a hook-up man, the man would wipe the front end off, unhooked the chain, the drier. Get in, spray the side windows, the windshield, do the windshield, the dash board, the steering column and drive it out. Men outside, usually three, four. One would get in the back, do the back windows, and the other three or four would

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wipe it off.

Q They would use these towels to wipe off the car?

A Yes.

Q How many towels would you use on a car?

A Each person would use two towels, sometimes more depending if there was any mud or anything on the car.

Q What's the fewest number and what's the most number of towels you might use on a car?

A Well, the driver uses one, the back window man uses one. And if there was four wipers, that would be eight more. And the man that does the front end, he would use one or two.

Q So that's eleven or twelve towels per car?

A Right.

Q How many cars would you get through the car wash on a busy day?

A On a busy day around four hundred.

Q Four hundred?

A Around approximately.

Q How many towels—how often do you use a towel before you had to launder it?

A One time.

Q One time.

So in a busy day you might have to use as many as 3,200 towels?

A Easy.

Q Easy, maybe more.

Do you know how many towels you'd start the day off with?

A Well, you were over there. You saw the bin.

Q There is a cart there. You don't have any idea how many were in it, though?

A I don't have the least idea.

Q Would all those towels have to be washed during the course of a day?

A No, the ones on top does. If they aren't real busy, the ones on the bottom aren't. They have already been washed.

Q If they are busy, they would have to?

A Yes.

Q Do you have any idea how many times the towels would have to be washed during the course of the day if you are busy?

A I don't know.

Q How long would a complete cycle take, if you can tell me, between you taking a wet dirty towel and start it in the washing machine until you got a dry towel at the end?

A Without the extractor about twenty-three minutes.

Q With the extractor how long would it take?

A Maybe about seventeen, eighteen.

Q Seventeen or eighteen minutes for the cycle?

A Right.

Q How long did the washing machine cycle take?

A Maybe five, eight minutes.

Q How long would the drier take?

A Fifteen minutes.

Q If you have the extractor, how long does the drier take?

A That would wring about a gallon or a gallon and a half of water out. That would cut down on the drying time.

Q When you had the Bock extractor, I take it you don't have it anymore, how long would the drier take?

A We put them in fifteen minutes now.

Q How about then?

A I think then ten.

Q Five for the washer, ten for the drier and whatever the extractor takes?

A Yes.

Q And you think the whole thing should take about seventeen minutes?

A Approximately.

Q Did you regularly use inmates from the Cumberland County Prison to work?

A When we could get them.

Q When you could get them?

A Right.

Q At the time in question, June 23, 1984, how many of these inmates other than Paul Green did you have working there?

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A I don't know offhand. I would say approximately five or six.

Q How many other employees would you have had, yourself and your wife and who else?

A Myself and my wife, usually ten or twelve.

Q Ten or twelve others?

A No, altogether.

Q Altogether.

So something like half to 60 percent of your employees would be from the prison?

A Right. Now we only have one.

Q Do these people come and go with some frequency?

A They travel by bus.

Q No, I'm sorry, I didn't mean do they get there fast. I mean do you have a lot of turnover?

A Yes, very.

Q In the course of a year how many different people from the prison might you have?

A Just depends how long they are in prison for, you know, their term. Some of them they send down for thirty days. Some of them has six months.

Q Okay. The—

A It varies.

Q Were any of the people who were working at the Lemoyne Minit Car Wash on June 23, 1984, are any of them still there

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other than yourself and your wife?

A Theresa is there.

Q She is not an inmate?

A No.

Q Other than that everybody turned over?

A We turnover maybe fifty to seventy employees a year.

Q Do you require any special training or sophistication in the use of laundry equipment before you let somebody work there?

A Theresa shows them all what to do, and he said—

Q Please just answer my question if you would.

But you don't have any special requirements?

A No. She shows them what to do.

Q Okay. I may have covered this, but I just want to make sure. Since the time you took over the business until the time of the accident did you or anybody working for you ever remove anything from that extractor?

A Not that I know of. I worked the same all the time.

Q Do you know if there was ever a warning label on that extractor?

A Not that I saw. Maybe at one time when I bought it but that's hard to say. That's a long time ago.

Q But it wasn't on the day of the accident?

A No.

Q What was written on the extractor that you can remember?

A I don't remember anything. Maybe the serial number and model number maybe might have been on.

Q That's all you can remember?

A Yeah.

Q Was there anything, any written material that was tagged to it or somehow attached to it?

A No.

Q Did you ever receive any correspondence from Bock about the extractor?

A No, I didn't.

Q Did you ever receive any correspondence or communication from the original seller about the extractor?

A No.

MR. MELILLO: That's all I have right now. Thank you.

THE COURT: Okay.

CROSS EXAMINATION

BY MR. NEALON:

Q Mr. Kelly, did you check your records to determine how many cars went through the car wash on June 23, 1984?

A Eighty-four.

Q Is that a slow day?

A Real slow. We closed at 2:15.

Q You closed early that day?

A Right.

Q What time did you open?

A Eight o'clock. Close at 4:30.

Q Now you indicated on direct testimony that on some days only the towels at the top of the bin would have to be washed, is that correct?

A Right.

Q So unless it was a busy day your beginning supply would be sufficient to take you through the day?

A Yes, sir.

Q Do you ever recall running out of towels?

A Once in a great while when you have a line to the top of the hill and have four to six wipers out there you'll run down very close to the bottom of the bin, but we always managed to get some out there, you know. We never actually ran out.

Q This extractor you said on at least one occasion you had to take the top off to take a towel out of the inside, is that correct?

A Right.

Q Did you ever take out the spin drum?

A Yes.

Q Did you ever notice a gash in it?

A No.

Q Did you see Paul Green operating this machine prior to the accident?

A Yes.

Q What did you observe?

A Well, he was doing what he was supposed to, but I already caught him putting his arm in there.

Q Before the accident?

A Yes, and I told him about it and he just smiled.

Q He smiled at you?

A Right.

Q Did you ever tell anybody to put their arm in the machine to slow it down?

A No, that would be like driving down the street in a car sixty, seventy miles an hour and trying to put your foot out to stop the car.

MR. NEALON: That's all I have at this time. Thank you.

MR. MELILLO: A couple on redirect, Your Honor.

REDIRECT EXAMINATION

BY MR. MELILLO:

Q Did you personally train Mr. Green on the use of the extractor?

A No.

Q Did you see him operating the machine on a regular basis?

A Well, he started out front. He couldn't do windows, so she took him off of that job and put him on wipe. And he

couldn't do that, so she put him inside, thought he may be able to handle that.

Q Do you know how many days he was on that before the accident?

A Maybe three, four.

MR. MELILLO: That's all. Thank you.

MR. NEALON: I have nothing further.

THE COURT: Thank you, Mr. Kelly. That's all, sir.

THE WITNESS: Shall I wait here?

THE COURT: You can go back. I don't know, do you want to call Mr. Kelly later?

MR. NEALON: During our case in chief we may want to.

THE COURT: Ladies and gentlemen, we shall take our recess now for lunch. It is a little early. I think the next witness may take a little time. So I think it is best not to interrupt a witness' examination.

We do take regular recesses usually after about an hour and fifteen minutes to an hour and a half. If any of you at any time would like a recess other than when I indicate, catch my eye, and we will be happy to recess at any time for you.

Okay. Please return to the courtroom at 1:30. In fact, be back a little early in the jury room, and we will start at 1:30. Okay. Thank you.

(The jury left the courtroom at 12:08 p.m.)

THE COURT: Mr. Nealon, you indicated you wanted to put something on the record concerning the introduction of the plaintiff's past criminal record.

MR. NEALON: Yes, the only thing I wanted to put on the record was that Mr. Melillo presented a motion in limine regarding the admissibility of the corruption of the morals of a minor charge that was a companion charge to the statutory rape charge. We believe that that's admissible under 609-A since it is punishable by more that a year imprisonment. Alternatively under 609-B as a crimen falsi act.

THE COURT: We ruled that you couldn't do that. So that will preserve the record.

Off the record now.

MR. MELILLO: If I could just put something on also.

THE COURT: Not on that point?

MR. MELILLO: It is related to it. It is what we discussed pretrial. I just want to make sure I preserve my objection to the criminal matters coming in at all.

THE COURT: All right. You objected to that and we note that exception, note an exception.

MR. MELILLO: Thank you, Your Honor.

(A discussion was held off the record.)

(Court adjourned at 12:10 p.m. and the case

continued a 1:30 p.m.)

THE COURT: Good afternoon, ladies and gentlemen. All right.

MR. MELILLO: Your Honor, at this time I'd like to show the jury a videotape which was made of the machine while it was still operating after the accident so they have an idea how it works and how long it takes to stop.

The machine is in the courtroom now, but I should note it is semi-disassembled, not in operating condition.

MR. NEALON: I would like to put an objection on the record that parts of this is testimonial in nature, that it includes portions in which towels are being shown put into the machine, and I don't think that's necessary, and I have no way to cross examine those people that did it. So I

would like to place an objection on the record concerning that portion of the videotape.

THE COURT: All right. We'll overrule the objection and perhaps a cautionary instruction might be considered later.

MR. NEALON: Thank you, Your Honor.

THE COURT: Okay. Ladies and gentlemen, this videotape I think is for a general demonstrative purpose, not how the accident happened or anything of that nature.

How long does this take?

MR. MELILLO: About twenty minutes, Your Honor,

perhaps a little longer.

(The videotape was played.)

MR. MELILLO: Your Honor, at this time I would like to have read into the record a portion of the deposition of John Emerick's testimony as previously taken, and I would like someone from our office play a part and read the responses.

MR. NEALON: Your Honor, I would like to place an objection on the record. This was taken during cross examination of a deposition for use at trial. At the time he was permitted to ask leading questions, and I believe on several occasions he did. I believe it is improper for him to use leading questions in this part of the case.

THE COURT: We'll overrule that objection.

This is—the witness' name is—

MR. MELILLO: John Emerick.

THE COURT: John Emerick. All right.

(The following was read from John Emerick's deposition.)

BY MR. MELILLO:

Q "You testified that you had taken the machine apart once to do some oiling before the incident, is that right?"

A "Yes."

Q "What does it require in order to take the machine apart in terms of manpower?"

A "One person can take everything out of it except for the

drum itself, the drum is heavy, it takes two to lift the drum out of the machine."

Q "On this prior occasion it took two people to lift it out?"

A "Yes."

Q "Do you recall or to your knowledge had the machine ever been disassembled prior to the time that you did it?"

A "I have no idea."

Q "But were you ever told by anyone that it had been?"

A "No, not that I remember."

Q "Were you given any kind of instruction manual to use when you took it apart?"

A "No."

Q "Did you ask for one?"

A "I asked if there was one and I was told no."

Q "Were there any instructions on the machine itself about how to maintain it?"

A "Not that I recall, no."

Q "Were there any instructions that you recall in the machine itself about the need for maintenance?"

A "No."

Q "Did you also take the machine apart after the incident?"

A "Yes."

Q "Why did you take it apart at that time?"

A "To clean debris and blood and so on out of it."

Q "When you took the machine apart at that time, did you

find that the outer curb had a gash in it?"

A "Yes."

Q "When was the first time you actually noticed that gash?"

A "I don't remember seeing it the first time I took it apart to oil it."

Q "Does that mean it wasn't there, you just don't remember?"

A "I just don't remember."

Q "You definitely did see it the second time?"

A "Yes."

Q "Could you describe for me what you observed in terms of the braking mechanism or other mechanisms inside of the machine?"

A "There was a braking mechanism at the base of the machine."

Q "What condition was it in?"

A "I would call it deteriorated or old."

Q "Was it rusted?"

A "Yes, you could say it was rusted, rusted or corroded."

Q "Before that time had you been aware that there had been a braking mechanism inside of the machine?"

A "No, I didn't know."

Q "In fact, while you turned the power off, while you used machine, had it ever braked to stop?"

A "No."

Q "How long did it take to stop after you turned the power off?"

A "Five, ten, somewhere around ten minutes."

Q "About ten minutes. Did you just give a discovery deposition to us; that is, did you just testify concerning similar questions a few minutes ago?

A "Yes."

Q "Did you say at that time it took about three minutes to stop?"

A "Three minutes?"

Q "Yes."

A "I don't think I said three minutes."

Q "It's your present testimony it takes about ten minutes to stop?"

A "Yes."

Q "I'm going to hand you an exhibit which is a series of photographs of the subject machine.

Can you testify as to whether or not you recognize that as the way the machine looked on the inside when you took it apart if you remember?"

A "Yes, that's the way it looked. This is the brake mechanism right here."

Q "What numbered picture are you referring to?"

A "The one I am pointing at right now is Number 21."

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Q "Twenty-one shows the braking mechanism?"

A "The ring around the outside and well, that's the pad around the outside and the wheel in center."

Q "That again is picture Number 21?"

A "Twenty-one."

(The reading from the deposition concluded.)

MR. MELILLO: That's all we wish to read, Your Honor.

For the record, what was shown to the witness is Plaintiff's Exhibit No. 3, picture 21 of that exhibit.

THE COURT: Okay.

Any cross examination at this time?

MR. NEALON: No, Your Honor. We'll have the entire deposition read and the testimony during our case in chief.

THE COURT: All right.

MR. MELILLO: Your Honor, at this time I would like to read certain portions of Mr. Clement's deposition into the record and also a few interrogatories, and that will end my case prefatory to the expert testimony.

THE COURT: All right.

MR. NEALON: Excuse me, what are you going to read first?

MR. MELILLO: In this deposition I was asking the questions and Mr. Clement was giving the responses.

THE COURT: Who is Mr. Clement?

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MR. MELILLO: Mr. Thomas Clement.

THE COURT: President of Bock Laundry. Okay.

You're not going to follow the same procedure that you did during the last deposition, have somebody read it from up here?

MR. MELILLO: I was going to read it myself. If Your Honor prefers, I can have Mr.—

THE COURT: You can do it however you want to do it. All right.

(The following was read from Thomas Clement's deposition.)

BY MR. MELILLO:

Q "Correct me if I'm wrong. The M-100 consists of two stainless steel baskets and another basket that was perforated—excuse me—the spin drum was perforated, and the other basket had a drain in it to let water out?"

A "The perforated part you referred to is what we call the basket and the outside tub assembly we called the curb, both of which are stainless."

Q "Were they both manufactured by the same company?"

A "We manufactured those within."

Q "You do that yourself. Are they both stainless steel?"

A "Yes, with the exception of the counter weight in the basket."

Q "What is the counter weight?"

A "It's the fly wheel that forms the self-balancing function of our basket. It was made of cast iron."

Q "How does the basket itself balance?"

A "It's suspended on a hex ball with six sides that forms the driving function but is able to rock back and forth on that ball. Inertia created by the fly wheel is greater than the off-side balance load that may be in the basket. It works very much like a gyroscope in the sense that as it builds RPMs, it builds inertia and eventually balances out any off-side load."

Q "Does that mean as an operator of the extractor, you wouldn't be terribly concerned about balancing out the load in the machine?"

A "They had to use some care, but you did not need to load it precisely in a balanced form."

Q "I think in response to an interrogatory question—I might as well pick out the exact one—Number 21, the question was, what mechanisms or other provisions were incorporated into the design of the M-100 to prevent the abrasion of the outer drum by the inter one? The answer, the machine was designed with adequate clearance between the basket and outer curb.

"Does the self-balancing aspect of the machine in any way add or facilitate keeping the baskets apart so there's no contact between them?"

A "To the best of my knowledge, the machine was designed so that the inter basket could not come in contact with the curb that you're referring to."

Q "Under any circumstances?"

A "Under any circumstances what?"

Q "Regardless of how the machine was loaded or whether or not the self-balancing mechanism was operating properly."

A "Could the curb or basket come in contact with the curb?"

Q Correct."

A I think it might be plausible, I don't know.

MR. NEALON: I believe that's possible.

MR. MELILLO: Possible, you're correct.

BY MR. MELILLO:

Q "Why do you think it might be possible?"

A "Because the machine that you and I looked at a month ago, upon a loose assembly, we found that the basket could touch that particular curb bottom."

Q "Do you have any idea why that occurred in that particular machine?"

A "I do not."

Q "Have you ever heard of something like that occurring before?"

A "No."

Q "How much clearance is there supposed to be between the basket and the curb?"

A "At this time, we're unable to find the original layout drawing. I can't answer that question."

Q "What is done at the time the machine is put together to assure that the clearance or tolerance actually exists befor the machine is shipped?"

A "Each machine, after its construction or final assembly, was tested four or five times, approximately. If found to be in good operating order, was released for shipment at that time."

Q "Is the basket removed to actually manually see whether or not there has been any contact between the curb and the basket during any of the tests?"

A "I don't know that."

Q "You don't know if, at any time, the basket is removed?"

A "I don't know if we actually ran the machine, and then subsequently removed the basket to see if contact was made. If it was, there would be a loud metal to metal clashing noise. It certainly would be noted by the man testing the machine which would cause it to be held from shipment."

Q "If the contact was very slight, would that necessarily be true, would you necessarily have a lot of noise?"

A "I would think it would make a racket."

Q "Have any tests been performed to actually determine whether slight incidental contact made a large amount of noise, and how much contact would cause a gash?"

A "Not to my knowledge."

Q "If, in fact, the self-balancing mechanism had been installed and working properly, can you think of any explanation for the basket touching the curb other than that the clearance was not proper at the time it was put together?"

A "Are you asking whether I know if any other—I'm not really certain of what you're asking."

Q "I'm asking you to assume that there was nothing at all wrong with the machine's self-balancing mechanism. I'm also asking you to assume that the customer never had the machine apart or did anything to change the original specifications of the machine. What other than the amount of

clearance between the basket and the curb could account for the rubbing of the two parts?"

A "I can't think of anything at the moment?"

Q "Is there anybody else at Bock who would have some special knowledge of why this could occur?"

A "I don't think. I think I would probably be the most knowledgeable. I certainly would have adequate knowledge at to why it could occur."

Q "Do you have any record of ever having a warranty claim made because the curb had been compromised or torn in some manner?"

A "No, not to my knowledge."

MR. MELILLO: That's the end of that section.

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MR. NEALON: Could we just have him read to the end of the page? He's sort of taking this out of context. There is a few more questions that someone explains the clearance of the curb.

MR. MELILLO: Sure, I'd be happy to.

THE COURT: And the reporter is taking this down. So if you don't read too fast.

BY MR. MELILLO:

Q "Do you know how the amount of clearance between the basket and the curb was determined, why it was one figure rather than other?"

A "I would think that during the original design, adequate clearance would have been designed into the product."

Q "I guess what I'm asking is, what is adequate? How was that determined, do you know?"

A "I don't know how it was determined. Adequate clearance to me would be in a fully tilted position that the center post would strike the shaft before anything else."

Q "When the contact occurred between the basket and the curb?"

A "I'm only surmising that. I didn't design it."

THE COURT: Is that enough, Mr. Nealon?

MR. NEALON: Yes, that's good enough. Thank you.

BY MR. MELILLO:

Q "How Many M-100s did Bock sell altogether, do you have

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any idea?"

THE COURT: What page number?

MR. MELILLO: Page 74, line 1.

A "I have a very general idea, approximately 10,000."

BY MR. MELILLO:

Q "Do you have any idea how many are still in operation today?"

A "No."

Q "Was there any particular period of time for which these machines were designed to work before they became worn out?"

A "Not to my knowledge."

Q "Were they designed to last for a long period of time?"

A "I would say that's a fair statement."

Q "Even decades?"

A "Again, I would say that's a fair statement."

MR. NEALON: Your Honor, I am going to object to the next portion that's being read in. I don't know how—

THE COURT: I don't know that is going to be read.

MR. NEALON: Okay.

MR. MELILLO: I was next going to read page 76, line 19 to 77, line 19.

THE COURT: Okay. Any objection to that?

MR. NEALON: 76, line 11?

THE COURT: 19.

MR. NEALON: That's fine, Your Honor. Thank you.

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BY MR. MELILLO:

Q "Just considering the M-100 now, is there any way an unsophisticated user would have any way of knowing that there was any problem with the machine just because you could open the lid and the machine would continue to run for 10 or 15 minutes?"

A "I'm a little unclear on your question."

Q "Was there anything either about the nature of the machine or anything written on it that would indicate to an unsophisticated user, such as Paul Green, that if the machine continues to spin for 10 minutes after you open the lid, there must be something wrong with it?"

A "Other than common sense, to my knowledge, I don't know of any warnings that would indicate that there was an unnatural condition to that particular type of operator."

Q "The booklet that went with the machine wasn't intended to be used along side the machine, was it; it wasn't affixed to the machine in some way? There's nothing indicated on it to indicate that it's supposed to be kept with the machine?"

A "No. It was supplied with the machine for the benefit of the purchaser."

Q "The purchaser would typically be an employer of other people who would use the machine, is that your understanding?"

A "Yes."

(The reading from the deposition concluded.)

MR. MELILLO: I have a few interrogatories I also

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want to enter into the record, Your Honor.

THE COURT: Okay. Do you want to indicate the number?

MR. MELILLO: First is No. 8(b) Do you claim any patent that covers any of the design features of the M-100? If so, state the date each patent was issued.

Answer: February 12, 1924.

Question No. 20: Do you know of other instances where the outer drum was abrated and compromised in

the spin drum thereby permitting water to pass in the compromised area of the outer drum?

Answer: No.

MR. MELILLO: That's all I have right now.

THE COURT: Okay.

MR. MELILLO: Your Honor, my next witness will be my expert, but he is due to be here from Maryland tomorrow morning the first thing.

THE COURT: Is that your only other witness that you intend to call?

MR. MELILLO: That's correct, my expert.

THE COURT: That will then close your case?

MR. MELILLO: Yes, it will.

THE COURT: All right. Does the defendant wish to present any testimony before the plaintiff concludes his case?

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MR. NEALON: Your Honor, the only persons we would be willing to put on would be fact witnesses. Mr. Clement is basing his testimony on what the expert will say as well as the other expert. As to these other fact witnesses, we had advised them to come tomorrow morning. I don't know if I could get a hold of them now. We could certainly try if that's what you'd like.

THE COURT: They are relatively short I assume? I mean short in their length of testimony.

MR. NEALON: Yes.

THE COURT: Okay. Fine.

Ladies and gentlemen, I think we are going to adjourn then for the day, although it's very early. I think the plaintiff correctly assumed that we wouldn't get this far today. Actually there were several other juries that were supposed to be selected this morning but were not. So we got going a little faster than I expected we would. I think all the other testimony will be able to come in tomorrow. So that the case will end rather promptly in any event.

Would nine o'clock tomorrow morning be inconvenient for any of you?

(No audible response.)

THE COURT: Okay. We will see you then tomorrow morning at nine o'clock. Thank you. You are excused for the day.

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Don't talk about the case. Keep an open mind.

(The jury left the courtroom at 2:08 p.m.)

THE COURT: You will have your expert here tomorrow?

MR. NEALON: That's what I was going to ask. I believe we can get through our testimony—everything but our expert tomorrow. I was planning on having my expert here the first thing Wednesday morning. I can call and see if there is a flight out of Chicago today.

THE COURT: I kind of think we'll want him tomorrow. I don't know how long your expert will be.

MR. MELILLO: Probably a couple of hours.

THE COURT: A couple of hours?

MR. MELILLO: For both direct and cross.

THE COURT: Right, and your other witnesses I wouldn't think would be more than an hour.

MR. NEALON: I think the four people that we'll have regarding what Mr. Green was told will total an hour, an hour and a half. Mr. Clement could take two hours easily by the cross and direct. Because we're going to have another [illegible] here that's—and so I would ask if we could schedule so my expert could be here the first thing Wednesday.

THE COURT: How long will your testimony of your expert be?

MR. NEALON: I expect an hour on direct and whatever Mr. Melillo has tops.

THE COURT: Well, I want to go to the jury on Wednesday.

MR. NEALON: Fine.

THE COURT: That's the only reason I'd like to not find us here at three o'clock tomorrow with nothing to do.

MR. NEALON: Well, I can make a call and see if he can get out of Chicago tomorrow morning.

THE COURT: Just so you understand, you know, [illegible] then have an expert on Wednesday and closings and the [illegible] and it might get late in the day.

MR. NEALON: I can ask Mr. Clement to drag out his testimony.

THE COURT: Don't do that. You use your own judgment.

MR. NEALON: I'll see what I can do.

THE COURT: I'm not going to be here Thursday and I'd like not to have this case go over. I'm sure Mr. Melillo doesn't want it either. I don't think it will either [illegible] right. We'll see you in the morning at nine o'clock.

(Court adjourned at 2:10 p.m. and the case continued May 12, 1987 at 9:00 a.m.)

(The testimony of Stanley R. Kalin is in a separate transcript.)

(After the recess the case continued at 10:35 a.m.)

THE COURT: Ready to proceed?

MR. NEALON: Yes. We would just submit these. We would like to make a motion, but we can do it later if you wish.

THE COURT: Fine.

MR. NEALON: Defense calls Delores Kelly to the stand.

MR. MELILLO: Your Honor, may we have an offer of proof on this witness?

THE COURT: No.

MR. MELILLO: May the other witnesses be sequestered?

THE COURT: That's fine.

DELORES KELLY, called as a witness, being duly sworn, testified as follows:

THE CLERK: Would you state for the record your full name, please, ma'am.

THE WITNESS: Delores Kelly.

THE CLERK: And the spelling of your last name, [illegible].

THE WITNESS: K-e-l-l-y.

DIRECT EXAMINATION

BY MR. NEALON:

Q Is it Mrs. Kelly?

[illegible]

Q Would you tell the jury where you presently reside?

A 117 North Thirty-fourth Street, Camp Hill.

Q How long have you resided at Camp Hill?

A Thirteen years.

Q Have you been a resident of Harrisburg?

A Yes.

Q How long?

A Fifty-four years.

Q Are you the husband of James Kelly?

THE COURT: Wife.

BY MR. NEALON:

Q The wife, excuse me.

A Yes. Yes.

Q Would you tell the jury what your occupation is?

A Well, I—I'm part owner of the Lemoyne Minit Car Wash with my husband James, and I take care of the register there and oversee all the help, and I guess your general, you know. My husband just takes care of all the equipment part. I take [illegible] of all the help and see that everything is run pretty [illegible]

Q Is that a family run business?

A Yes. It's just my husband and I.

Q Would you tell the jury what your hours of operation are?

[illegible] they are 8:00 to 4:30. At one time we used to open—well, now we still open Monday, Tuesday, Wednesday, Thursday we are open from 9:00 to 4:30. And Friday and Saturday we are there from 8:00 to 4:30. But the 8:00 to 4:30 the two days that's just been the past year that we started to open a little earlier.

Q Are you there most of the time when it is open?

A Everyday.

Q Do you take a few hours off each day?

A No. No. the only time I take off is if I have a doctor's appointment, and I used to take off once in awhile when I had my hair done. I don't get my hair done anymore. I do it myself.

Q Have you ever taken a vacation?

A Well, this June I'll be married thirty-five years, and last February was my first vacation that I took, and I went to Hawaii. And that was because a friend just had lost her husband, and she asked me if I would be a part and go along with her.

Q Is that requirement—is that because of the [illegible] of the operation of the car wash?

A That I had to take a vacation?

Q That you don't take vacations.

A Right. Right, because my husband, if I'm not there, he's there. We don't leave. He feels a little uneasy.

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[illegible]—he just likes it best when I'm there.

Q Do you recall Paul Green?

A Yes, very well.

Q Do you recall the date of this accident?

A Yes, I do.

Q How long prior to the date of the accident was Paul Green employed at the car wash?

A It wasn't long. Maybe—maybe not even a week he was with us, maybe two weeks, I can't remember that, but it wasn't a long period. It wasn't more than two weeks, I know that.

Q What were his duties when he first came to the car wash?

A Okay. When he first came we tried to put him outside, out front as a wiper, and he didn't seem to be able to handle that job. So my husband put him on another job, I think windows, and he couldn't handle that job. So I said to my husband maybe it's best if we take him inside with Theresa. This is a little girl that works for us. She's been with us seven years, and I said under her supervision maybe she can (illegible) him that job unhooking inside and doing the towels.

Q Do you recall how many days prior to the accident Mr. Green would have been put on inside jobs there?

A Not long.

Q Did you help Mr. Green in learning how to use the—

A When we first put him on, I walked out and I explained

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[illegible] you don't release the lever. There was a lever on top of the machine that you have to pull, and it was pretty hard sometimes for me. It wasn't—I don't know, maybe it wasn't for him. But I told him you don't ever release that lever and open that lid until the machine stops. You know, you couldn't open the lid unless that lever come over because I operated it a few times.

MR. MELILLO: Your Honor, I am going to object to the response, and this goes to my initial request for an offer of proof. The relevancy of this kind of testimony, I think is primarily on the issue of contributory negligence, which is not in this case.

THE COURT: I don't think so, Mr. Melillo. Assumption of risk and knowledge of the danger is in this case.

MR. MELILLO: May I have a continuing objection so I don't have to interrupt?

THE COURT: Certainly.

MR. MELILLO: Thank you very much.

BY MR. NEALON:

Q You can continue.

A So I had explained to Mr. Green not to open the lid until the machine was through. But I said, you know, like I said before, it was an awful danger, you could get your hand cut off. But when I said that to him, he sort of—he had

[illegible] a chip on his shoulder. He was a cocky fellow at that time.

MR. MELILLO: Your Honor, I am going to object to that characterization of him. There is no basis for that.

THE COURT: All right. We will ask the jury to disregard that answer, please.

BY MR. NEALON:

Q Did he make any response to you?

A He sort of snickered like you don't know what you are talking about, you know.

THE COURT: All right, he snickered.

THE WITNESS: Yeah.

BY MR. NEALON:

Q Between the time that you initially observed Mr. Green working on the extractor and at that time you assisted him and the date of the accident did you ever see Mr. Green using the extractor?

A Yeah, I seen him one day I walked out and I seen him sitting on the washing machine. And I think I called him down on that and asked him—

THE COURT: Wait a minute. Now the question was did you ever see him operating the extractor.

BY MR. NEALON:

Q This machine, did you ever see him using this?

A Yes. Yes, I seen him operating it.

Q What was he doing?

A I think he was carrying towels inside. You have to go outside and get a load of towels and take it in, and at that time he was pushing the towels down in preparing the machine. You have to take the towels and put them all around.

Q Did you ever see him putting his arm in while it was spinning?

A No, I never seen that.

Q At the time of this accident was there a man employed by the name of David Long employed by the Minit Car Wash?

A There was I'm pretty sure but I don't remember that fellow.

Q Did you ever instruct any other employees that they should put their arm in this machine while the basket was spinning?

MR. MELILLO: Objection, Your Honor.

THE COURT: Objection sustained.

BY MR. NEALON:

Q Did you ever observe David Long putting his hand in the machine while the basket was spinning?

A Like I say, I don't remember David Long.

MR. NEALON: Thank you. That's all.

THE COURT: Any questions, Mr. Melillo?

MR. MELILLO: I have a few, Your Honor.

CROSS EXAMINATION

BY MR. MELILLO:

Q Mrs. Kelly, how long were you associated with the car wash business?

A Now?

Q Since when that date over a year approximately.

A Well, it's about thirteen years because my in-laws are dead twelve years, and it would be about thirteen years that I really got involved in the car wash. Before that I used to go over just once in awhile.

Q Did you personally work with the extractor much?

A Oh, not everyday, not on an everyday basis. I would go out and check the men when they were working. I do that now.

Q But you had some familiarity with the machine since the time you started with the car wash, is that correct?

A Yes.

Q Has it always to your knowledge worked the same way since you started there?

A Always.

Q To your knowledge did it ever have any feature which would prevent the lid from opening before it stopped?

A I didn't hear that.

Q I will repeat that. To your knowledge did it have any safety feature which would prevent the lid from opening until it had come to a complete stop?

THE COURT: Do you understand the question, Mrs.

Kelly?

THE WITNESS: Yeah. Well, I think I understand. I always thought that you had to release the lever there before you could lift the lid.

BY MR. MELILLO:

Q And then you could lift the lid?

A Then it was a little hard to lift the lid.

Q But it could be done?

A But it could be done.

Q Do you know how long it would take the machine to come to a stop after the power was turned off, a complete stop?

A It took a little while, I don't know exactly how long, but it took a little while. It didn't cut off like your normal washing machine at home. It took longer.

Q Mrs. Kelly, when you first interviewed Paul Green did you indicate to him that you didn't especially like people from Newville?

THE COURT: I'm sorry, I can't hear you, Mr. Melillo. Your voice drops.

MR. MELILLO: It does and I apologize for that. That's a problem I have.

BY MR. MELILLO:

Q When you first interviewed Mr. Green did you tell him you didn't especially like people from Newville? You didn't like people from Newville.

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MR. NEALON: I object. He was upset before about what she thought about Mr. Green, now he's asking her on cross examination.

THE COURT: Overruled. You may answer the question.

A I don't think I ever made that remark to Paul Green. I might have said to him, you know, we do get a lot of men from Newville, and I may have made this remark to him, because I know that I have made it to several men from Newville, "Now I hope you do a little better for me than the last guy I had from Newville because they seem to all have a little chip on their shoulder," and I might have said that to him. But I didn't say nothing where I didn't like him.

BY MR. MELILLO:

Q That's fair. That's what I wanted to know.

MR. MELILLO: That's all I have. I have one more.

BY MR. MELILLO:

Q Do you know what time you stopped operation on the day of the accident?

A I went up home for lunch, I have to tell you this to get that, and Theresa had called me immediately. I just walked in the door and I got right back in the car and I came down and that was lunchtime. We break 12:30 to 1:00. So it wasn't too long after that that we had closed then because of the accident because everyone was shook up.

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MR. MELILLO: Okay. Thank you.

THE COURT: Thank you, Mrs. Kelly.

REDIRECT EXAMINATION

BY MR. NEALON:

Q You said you closed at about 2:30 that day?

A It was a little after lunch. I don't know exactly the time.

Q Prior to lunchtime what types of jobs were the men doing? Were they washing cars or doing other work?

Q Before I left to go up home I said to Theresa we were slow that day, that morning, and I said to Theresa to make sure that they all get on this side work. That's what we do when we are slow, we expect all the men to do side work, which is mopping, doing windows, you know, in the building or the bathrooms.

THE COURT: What's the purpose of this question?

MR. NEALON: I just wanted to establish what type of day it was. He was asking when they closed, and there is some question whether this was a slow or a busy day.

THE COURT: She has indicated it was a slow day. [illegible] anything else?

MR. NEALON: No. I was just letting her finish her answer.

MR. MELILLO: That's all I have.

MR. NEALON: Our other witness is outside.

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THE COURT: You are excused, I'm sorry.

MR. NEALON: Defense calls Martin Shetrom.

MARTIN ROBERT SHETROM, called as a witness, being duly sworn, testified as follows:

THE CLERK: Would you state for the record your full name, please, sir.

THE WITNESS: Martin Robert Shetrom.

THE CLERK: The spelling of your last name?

THE WITNESS: S-h-e-t-r-o-m.

DIRECT EXAMINATION

BY MR. NEALON:

Q Mr. Shetrom, state your current residence?

A 311 Beaver Avenue, Enola.

Q How long have you resided there?

A Since 1980.

Q Do you know Paul Green?

A Yeah, I know Paul.

Q How do you know him?

A From down at the car wash.

Q Were you a fellow employee of Mr. Green's?

A Well, we was working in the car wash together.

Q Were you also in prison with him?

A Yes.

Q Were you on work release?

A Yes.

Q What were you in prison for?

A Aggravated assault.

Q Have you ever been convicted of any other crime in your life?

A No.

Q How long had you worked at the car wash prior to this accident?

A I'll say two and a half to three months roughly.

Q How long had you worked with Mr. Green?

A Oh, I would say roughly maybe two, three, something like that, weeks, whatever.

Q Did you instruct Mr. Green on how to use the extractor?

A I showed him the way I was taught.

Q What did you show him?

A The only thing that I was ever taught is once you put the towels in there and you get it started leave it run so long, shut it off and wait till it stops before you even bother with the machine.

Q Is that what you told Mr. Green?

A Yes.

Q Did you assist Mr. Green from the time that you initially showed him and the date of the accident regarding the operation of this machine?

A I don't think it was only me. It could have been John or somebody else that was working there too from the prison.

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Q Did you help him—I didn't understand you. Are you saying it could have been you or not?

A It could have been. It could have been John or whoever else was working from the prison.

Q Did you ever tell him to slow down the machine and you should place your hand into it?

A No.

Q Did you ever do that?

A No.

MR. NEALON: Thank you. That's all I have.

CROSS EXAMINATION

BY MR. MELILLO:

Q Mr. Shetrom, how many people other than yourself were involved with the use of the extractor when Mr. Green was there?

A That would depend who was probably up front. Like whoever could have been running the cars out. Even Mr. Kelly, sometimes he helped when we got too busy.

Q Do you know from your personal knowledge whether any of those other individuals would have shown Mr. Green how to slow the extractor?

A No, not that I know.

Q Mr. Shetrom, if you had in fact showed him how to do that and this accident occurred, is that something you would have gotten in trouble with the prison authorities?

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A The only thing I can say there is I told him don't even try to stop it, leave it stop itself. That's the way I was taught. That's the way I told him.

Q And you were in prison for aggravated assault?

A Yes.

MR. MELILLO: That's all. Thank you.

THE COURT: Okay.

MR. NEALON: I have no further questions.

THE COURT: Thank you, Mr. Shetrom. You are excused.

MR. NEALON: Your Honor, we are going to read into the record a deposition of John Emerick at this time. I just need a few minutes. I'm also going to ask John Clement to read this, John Emerick's deposition.

THE COURT: Ladies and gentlemen, it occurs from time to time that statements taken under oath from witnesses are read to you based on the transcript of the interview, and that is what is occurring here.

Now what's the witness' name?

MR. NEALON: John Emerick, E-m-e-r-i-c-k.

THE COURT: John Emerick. All right.

We do this by question and answer. In this manner it is easier for you to listen.

(The following was read from John Raymond Emerick's deposition.)

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DIRECT EXAMINATION

BY MR. NEALON:

Q "Would you please state your full name for the record, please?"

A "John Raymond Emerick."

Q "Where are you presently residing?"

A "Cumberland County Prison."

Q "Could you tell the jury the reason why you are incarcerated at the Cumberland County Prison?"

A "For a theft charge."

Q "When did that occur?"

A "September 1982."

Q "When did you begin your incarceration at the Cumberland County Prison?"

A "March 28, 1983."

Q "Since that time have you participated in the work release program at the prison?"

A "Yes, I have."

Q "Are you presently participating in the work release program?"

A "Yes, I am."

Q "Where is that?"

A "The West Shore Elks Club."

Q "Could you describe your duties, please?"

A "I have a variety of duties, I do maintenance work,

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[illegible], cooking, serving, some minor bartending."

Q "How many hours a week do you work there?"

A "45 to 50."

Q "In the past, were you employed by the Lemoyne Minit Car Wash?"

A "Yes, I was."

Q "Could you state when you first began working there?"

A "Early January of '84."

Q "Do you recall an employee at the Lemoyne Minit Car Wash named Paul Green?"

A "Yes, I do."

Q "Do you recall when he started working there?"

A "Not exactly, no, I don't. Exactly when he started, I don't."

Q "Would you know how long prior to June 23, 1984 in say days or weeks that he had started working there?"

A "Approximately three weeks."

Q "Did you instruct Paul Green at any time prior to June 23, 1984 on how to use the water extractor?"

A "Yes, I did."

Q "When would that have been?"

A "Say a week prior."

Q "Would you explain how you instructed him to operate the machine?"

A "Well, the training process on the towel and bumper man

[illegible] unhooking man is you teach them the process, unhooking the cars, what to do with the chains, how to operate the washer, and also how to place the towels in the extractor, extract them, take the towels out and put them in the drier.

"He was stressed several times not to put his hands inside of any moving equipment, the washer or the extractor."

Q "Could you explain how the extractor worked at the time that you instructed Paul Green how to use it?"

A "I just—you open the lid, place the towels in, close the lid, pull the handle over till it contacts the starting mechanism and it builds up speed over a period of several minutes.

When it comes to its peak speed, you pull the handle back and let it stop. When it stops you take the towels out."

Q "When you pull the handle back was the power disconnected?"

A "Yes."

Q "While the power was on, were you able to lift the lid?"

A "No, because the handle was on the top of the lid."

Q "Did you take Paul Green through that process?"

A "Yes."

Q "Can you tell me"—excuse me, you have to skip to line 24 on that page then. "Can you tell me what you instructed

Paul Green to do regarding the machine?"

A "I instructed him on the proper operation of it, and stressed strongly not to put his hands or any other body parts inside of the moving machine."

Q "Prior to this incident, had you ever taken apart the machine?"

A "One time prior to the accident you mean?"

Q "Yes."

A "One time for cleaning and oiling."

Q "Can you describe the process that you would have had to go through to do that?"

A "You have to take the top base off, the top cover, lift the drum out, and then take the lower base up and all of the way at the bottom of the machine is the motor, oil the oil cups, then return and reverse your process, put the machine back together."

Q "Do you know how long that entire process took you?"

A "From start to finish, approximately an hour, you know, apart, oil the motor, put it back together, I would say an hour."

Q "Had you ever worked on a water extractor prior to this time?"

A "No, I didn't."

Q "Did you have any training on working on laundry equipment prior to this time?"

A "Well, family training through my brother, different odd repairs of household items that—it's cheaper to repair yourself than to pay a service man to do."

Q "But no formal training?"

A "No formal training."

Q "After this incident happened did you take apart the machine to clean it?"

A "Yes, I did."

Q "Could you tell me how long it took you to do that, to take—excuse me, could you tell me how long it took you to simply take apart the machine?"

A "Approximately half an hour to take it apart."

MR. NEALON: "Thank you, that's all I have."

CROSS EXAMINATION

BY MR. MELILLO:

Q "Mr. Emerick, you testified that you believed Paul Green had been there for three weeks, if I told you he was there for approximately six days would that surprise you?"

A "It seemed like longer than that, but it's been a long time, I don't remember exact dates how long he was there."

Q "You also testified that you told Mr. Green not to put any body parts in the machine? Did you actually ever observe Mr. Green doing anything like that?"

A "Not that I can remember, no."

Q "Could you tell me a little bit about the operation of

the laundromat," excuse me, car wash, "and what is required to get towels used in the car?

"I said laudromat, I meant car wash, but the laundry facilities there?"

A "The dirty towels were brought in after they're used on the cars. They're washed in a regular washing machine. The washing does the—or spin job.

"They take them out of the washing machine, put them in the extractor. From the extractor they go into the

drier and they're dried. They are taken back out front for reuse."

Q "How long does the whole operation take as you remember it from when you take a wet dirty towel and you come out with a clean dry one?"

A "Washing, extracting and drier time per load, 45 minutes, because you don't dry the towels completely, a damp towel absorbs more water than a drier one."

Q "About 45 minutes to go through the cycle?"

A "Roughly, yes."

Q "How many towels would you have to use on a car in order to dry it?"

A "It varies from car to car. I would say at the most eight, big car ten."

Q "And what is the least you could get away with?"

A "Four."

Q "So somewhere between four and ten towels per car you

would have to use?"

A "Right."

Q "How many cars would come through the car wash on a busy day?"

A "100 to 175."

Q "100 to 175. So you would need quite a bit, in excess of a thousand towels on a busy day?"

A "Right."

Q "Do you have any idea how many towels they started out with?"

A "No, I don't know, a cart full."

Q "Do you have any idea how often a towel would have to be washed in the course of a busy day?"

A "Maybe three times, four times."

Q "Three or four times?"

A "It would depend on the amount of towels you started with."

Q "Did you ever run out of towels?"

A "Yes, yes, we have been—we were busy to the point where we need towels and they just weren't getting done quick enough."

Q "It is fair to say that when you are busy there is a fair amount of pressure to get towels for drying the cars?"

A "At times, yes."

Q "Do you recall if the morning or afternoon of the

[illegible] on June 23 of 1984 was busy?"

A "I don't recall exactly. I don't think it was, but I don't remember."

Q "Do you recall giving a statement previously on or about July 3 of 1984 about the incident to somebody?"

A "I talked to somebody, but I don't remember who it was."

Q "Let me show you this statement—"

MR. NEALON: "I am going to object. He hasn't established that he remembers giving the statement. He said he might have."

BY MR. MELILLO:

Q "Let me ask if this refreshes your recollection, if you take a look at this document and read it over and see if it sounds like the statement you may have given?"

A "Yes."

Q "You recall that is your statement?"

A "I don't remember the name but if I remember—she was a colored woman—"

MR. NEALON: "Objection."

BY MR. MELILLO:

Q "Does that refresh your recollection about the statement?"

A "Yes, sir."

Q "Does it indicate—did you indicate in that statement whether or not you believed that you were busy on that particular day?"

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A "Wait a minute."

Q "Take a second to read it, sure."

MR. NEALON: "I'm going to object to the form of that question. I believe you can ask him if it refreshes his memory, then you can reask the question, but you can't ask him what that statement says."

THE WITNESS: "Okay, we were fairly busy. The statement does say that."

MR. NEALON: "Objection."

BY MR. MELILLO:

Q "Does the statement refresh your recollection whether or not you were busy that day?"

A "Yes, it does, I did say we were fairly busy."

MR. NEALON: "I'm going to object. I don't believe that satisfies the requirement of present recollection refreshed."

BY MR. MELILLO:

Q "Do you remember now whether you were busy?"

A "I will go with what I said on the statement, we were fairly busy but, you know."

Q "Thank you."

A "It's going on three years—"

MR. NEALON: "Same objection."

MR. MELILLO: Starting again on page 17, line 16.

BY MR. MELILLO:

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Q "Were you present when the accident occurred?"

A "I was at the car wash, but I wasn't with Mr. Green, I was in the back of the car wash with Daryl Butler."

Q "How long after the incident did it take before you got there?"

A "I heard a thud. We were say from here to the tree row away. We both ran up to see what the problem was because we didn't have any car at the present time.

"When we got up there I found Paul in the corner and that's when Daryl told me—I noticed the blood and Daryl told me that his arm was removed, amputated."

Q "Paul Green I believe will testify that he was attempting to slow the machine by using a towel wrapped around his hand and applying pressure on the center spindle.

"Do you recall whether you ever discsussed this particular operation with him?"

A "Not in general, just the fact that keep the hands out of the—"

Q "I would like you to answer the question I asked. Did you ever discuss that particular operation with him?"

A "No."

Q "Do you know if other people attempted, you can tell me if you don't know, but do you know if other people attempted to slow the machine in order to get it to stop more quickly in some manner?"

A "Not that I know of."

Q "You just don't know. To your knowledge while you worked at the car wash did the machine ever have any kind of features such that you couldn't open the lid even after you turned the power off until it had come to a complete stop?"

A "No."

Q "You could in fact open that lid while it was still spinning?"

A "The handle was on a swing mechanism. You only had to pull it a little bit to stop the power and at that point the lid still would not come up because the handle was on top of it, but if you pull it back further, then the lid could be opened."

Q "Is there anything that prevented you from pulling it back further if you want to?"

A "No."

Q "Then you could open the lid?"

A "Right."

Q "It would still be spinning?"

A "Yes, the power is off, but it is still spinning free."

Q "You weren't aware of any safety mechanism in the machine that might have had—that was supposed to prevent somebody from doing that?"

A "No."

Q "In fact, the machine didn't brake at any time when

you were there?"

A "No."

Q "You weren't aware it even had a brake until you disassembled it after the accident?"

A "Correct."

MR. MELILLO: "That's all I have right now, thank you."

REDIRECT EXAMINATION

BY MR. NEALON:

Q "Mr. Emerick, you indicated that on at least one occasion you asked Mr. Kelly for a manual for the machine?"

A "Yes."

Q "Would that have been during the time that you took apart the machine prior to the accident?

A "I think that's the time it was."

Q "Did you ever suggest to Mr. Kelly that some work had to be done on the machine?"

A "I don't remember if I did or not."

Q "You indicated on cross-examination that on some days there was pressure to get towels dry so that you could use them on the cars?"

A "Yes."

Q "Did anyone ever tell you that in order to get the towels dry you should stick your hand into the extractor to slow it down?"

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MR. MELILLO: "Objection, leading. This is Redirect."

THE WITNESS: "No."

MR. NEALON: "That's all I have."

(The reading from the deposition concluded.)

THE COURT: All right. Thank you, sir.

MR. NEALON: Your Honor, we have another witness coming from the car wash who will not take long. She should be here any second. The owner of the car wash is trading places with her.

The only other witness we would have after that is Mr. Clement, who I expect will take some time. I prefer not to put him on, rather than have to break for Mr. Clement.

THE COURT: Where is your expert witness?

MR. NEALON: As I explained to you yesterday, we couldn't get him out of Chicago until today.

THE COURT: I think you better go ahead with whoever is here.

MR. NEALON: When the other person comes may we interrupt? The bulk of his testimony concerning the operation of the machine I'd like to wait—

THE COURT: We will interrupt if it is a short witness.

MR. NEALON: Yes, it is.

THOMAS CLEMENT, called as a witness, being duly

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THE COURT: Yes, Mr. Swartz, I will charge the jury on the law. You just argue the facts.

MR. SWARTZ: Very well, You Honor.

(Mr. Swartz concluded his closing statement. Mr. Melillo made a rebuttal statement.)

THE COURT: Ladies and gentlemen, the arguments of counsel have been concluded, and my function will be to charge you on some of the things you will want to consider in your role as jurors and also to tell you about the law that applies to this case. Because of the hour I think what we are going to do is adjourn for lunch until one o'clock, and at one o'clock I will deliver a charge to you which will not be lengthy, and then you will begin your deliberations at that time.

So please keep an open mind. Don't discuss the case among yourselves or, of course, with anyone else and return to the courtroom a little before one o'clock.

You may be excused. Thank you very much.

May I meet with counsel briefly.

(The jury left the courtroom at 11:50 a.m.)

(A discussion was held off the record at side bar.)

(Court adjourned at 11:52 a.m. and the case continued at 1:00 p.m.)

THE COURT: Good afternoon.

Ladies and gentlemen, it's my function now to tell you a little something about the duties you perform as jurors

and, as I have indicated, to tell you the law that is going to have to be applied in this case.

As jurors, you, of course, play a very important role in the administration of justice because the determination of all the facts in the case is exclusively for you. It's your duty to accept from the Court the rules of law which govern the

case, and you shouldn't disregard what we tell you about the law, but as to the facts, you are the exclusive judge.

If you're recollection of the evidence differs from that expressed by counsel or anything that I might say, follow your collective recollection of the testimony. If the inferences that you think should be drawn from the facts differ from something that might be suggested to you, again follow the inferences that you think should flow from the facts.

Now you shouldn't infer from this that you are to ignore or disregard what counsel have said in their closing addresses. It's not only your right but it's your duty to consider their arguments and to view and examine the evidence in light of what they have said, but you do have the right in the final analysis to reject any arguments that you do not think follow from the evidence because the determination of the facts is for you.

In arriving at the facts you must consider only the

evidence in the case, but you are, of course, permitted to draw such reasonable inferences from the testimony and the exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts.

In this case your verdict must be unanimous. The eight of you must concur in the answers to the questions that I will submit to you in just a short while.

The plaintiff is in court as a claimant, and under the system that we use the plaintiff has what we call the bur-

den of proof or the responsibility to satisfy you by a fair preponderance of the evidence of his right to recover.

By the fair preponderance of the evidence I guess the example that one of the attorneys used is the best one we can come up with that when you put the evidence in favor of one party in the scales and the evidence in favor of the other party in the other scales in whose favor do the scales tip. If they tip even slightly in favor of the plaintiff, then he may be said to have sustained his burden of proving his case, but should the scales be evenly balanced in your minds or should they tip in favor of the defendant, then the plaintiff has not proven his case by a fair preponderance of the evidence and in that event could not recover.

You, as jurors, are the sole judges of the

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credibility of each of the witnesses who appeared here before you. By that we mean their worthiness of belief. You must determine which of the witnesses you believe, what portion of their testimony you accept and what weight you attach to it.

Credibility does not mean merely truthfulness or the lack of it, although that is certainly important, but credibility includes accuracy of recollection and accuracy of observation.

It's possible that a witness intends and desires to be truthful and yet through faulty memory, faulty observation, the passage of time or for many other reasons might be honestly mistaken in his testimony. So you must determine how much of the testimony is both truthful and correct for these are the elements in judging credibility.

In passing upon the credibility of witnesses you have the right to determine which witnesses are more worthy of credit and belief, and in making this determination you may assess their accuracy of memory and observation, the appearance they make here on the stand, the manner in which they testify, their apparent candor and fairness or the lack of those things, the probabilities or the improbabilities, the interest that they have in the outcome of the case, all these things may be considered by you as you evaluate the testimony of each witness. You should consider all the facts which might in any way affect the weight to be given

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testimony, but you should consider all of the testimony in order to determine the truth.

There is conflicting testimony in this case in certain respects, and you're going to have to, where necessary, resolve the conflicts that occurred in the testimony.

One of the matters which the law in federal court permits to be introduced is a person's past criminal record, whether he be a party or just a witness, and the only purpose of that is not to prejudice him certainly, it's only to give you all of the information that you are entitled to have in determining whether or not that witness is credible, and you may consider that evidence when you evaluate Mr. Green's testimony. Certainly it doesn't mean that one who has been convicted of a crime is not a truthful witness, but it's just something that you may consider along with everything else in judging Mr. Green's credibility.

In judging credibility there is a principle in the law taken from a Latin phrase, falsus in uno, falsus in omnibus,

which loosely translated I believe means false in one thing, false in many. This principle has it that if a witness testifies falsely to a material fact and you the jury is satisfied that the witness has been guilty of a conscious falsehood or an intentional misstatement you may, if you wish, disregard all of the testimony of that witness in its

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entirety. You don't have to do that, but if you determine that a witness testified falsely and consciously to a material fact, you may, if you wish, disregard that witness' testimony in its entirety.

You also heard testimony from Mr. Kalin and Mr. Litwin. These gentlemen are both in the category of expert witnesses, and I would like to say something to you about evaluating testimony from such witnesses.

Frequently the issues in a case involve matters of scientific or specialized knowledge or experience that cannot be determined intelligently merely from the deductions made and the inferences drawn on the basis of ordinary knowledge, common sense and the practical experience gained in the ordinary affairs of life. Issues of this kind create the necessity for the admission in evidence of the opinions or conclusions of witnesses who are shown to be specially skilled or experienced in the particular field in question.

Generally speaking to be competent to testify as an expert witness one must have acquired such special knowledge of the subject matter about which he testifies either by study or the recognized authorities, by education or by experience so that he can give the jury assistance and

guidance in solving a problem which the jury is not able to solve because their knowledge might not be adequate.

One qualified by professional, scientific or . . .

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. . . insurer. An insurer of a product would be responsible if the user of a product was injured by the product in any way. The guarantor of a product is responsible only if the user is injured as a result of a defect in the product.

So to reiterate, you must decide initially whether when this extractor left the defendant's control in 1965 there was a defect in it. If there was no defect when the extractor left the manufacturer, then the defendant in this case should receive your verdict.

I'd like to just comment and clarify one other point that may be in your minds. In order to establish a defendant's strict liability for selling a defective product the plaintiff in this case or any other products liability case is not required to show that the defendant, in this case Bock Manufacturing, was negligent because this is not a negligence case. Bock can be liable even if it exercised all possible care, and no consideration should be given to negligence when considering whether the Bock extractor was defective. The question to be answered is whether plaintiff has established by a fair preponderance of the evidence that the defendant's extractor was defective when it left Bock's control and, if so, whether the defect caused the accident which occurred to the plaintiff.

Now I want to say a few words about the issue of warnings. Even a properly made and designed product may be

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defective if not accompanied by proper warnings and instructions concerning its use. A manufacturer must give such warnings and instructions as are reasonably required to inform users of any special or significant risks that may be involved in using the product or machinery.

There has been testimony that a warning label was routinely attached to the extractors produced by Bock and that one was attached to this unit when it was shipped in 1965. However, its present owners; that is, the people who own it now, did not recall seeing any warning since 1968 when they took over the business. The plaintiff contends that any warning given by the defendant was inadequate and that because of the potential danger involved a more permanent form of warning should have been attached to the machine. You must determine if the Bock company gave a warning and whether the warning was adequate, and these questions must be evaluated by the circumstances that existed in 1965 and not by what was reasonable at the time of the accident or even today.

In determining if a warning should have been given by the defendant in some particular form or way not shown in the evidence, you must inquire whether an average or reasonable user would require a specific warning about the danger complained of. Thus you may decide whether plaintiff would have been injured if a warning had been present on the

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machine; that is, whether Mr. Green would have needed a warning not to reach into the moving drum.

A manufacturer is not, however, required to warn with respect to a machine which is dangerous or potential-

ly dangerous only when misused and the danger or potentiality of danger from such misuse is generally known and recognized. A manufacturer is entitled to believe that the machine will be used in its intended manner and need not be a guarantor for unusual risks or misuses that an operator might choose to make. The duty to warning extends only to foreseeable uses and foreseeable modifications of the product, those of which the seller knew or should have known and only then when any danger is not apparent to the user.

If you have concluded that no warning was given in this situation or that any warning that was given was inadequate, then in that case there was a duty to warn of the danger complained of, and you must determine whether the danger was obvious.

The question of obviousness of the danger requires you to focus on the knowledge and understanding of the ordinary consumer who would purchase or who would use the defendant's product. In the present case you must focus on whether persons who work around such equipment would recognize and appreciate the danger without needing a warning concerning putting one's hands or arms into the revolving

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basket.

The rule requiring a manufacturer to inform users of the risks inherent in their product is based on the sound policy that the users are entitled to the information necessary to make an intelligent choice as to whether the product's utility or benefits justify exposing themselves to the risk of harm. Implicit therefore in the duty to warn is

the requirement that the user be ignorant of the dangers warned against. Thus it is generally held that there is no duty to warn when the danger or potentiality of danger is obvious or is actually known to the injured person.

Here the defendant contends that the plaintiff was aware of the risk involved or should have been aware of the risk in what he was doing and that he assumed that risk, and that leads us to the matter of the defense that has been raised by the defendant of assumption of risk. Here the defendant is the claimant in effect. It is contending that the plaintiff assumed the risk of the injury that he sustained, and in regard to that claim the burden of proof that I mentioned earlier by proving matters by a fair preponderance of the evidence in connection with this defense is upon the defendant. The defendant must show you by a fair preponderance of the evidence that the plaintiff assumed the risk of his injury.

The manufacturer is not required to design a . . .

* * * * *

. . . charged you on and by answering the four questions a verdict can be entered.

The first thing that you should do when you retire is to select one of your number to be the foreman of the jury. That person will generally be in charge of your discussions and will also sign the form which you have in hand.

The first question in this verdict slip is has the plaintiff shown by a fair preponderance of the evidence that the extractor manufactured by the defendant in 1965 was defective when it left the defendant's control. This, of course, is the principal question in the case. If the answer to that is

no, then that is the end of the case, and you would answer no further questions and return to the courtroom.

But if you decide that the defect existed in the machine when it left the defendant's control, then you must answer question No. 2 which asks you merely to indicate the nature of the defect. It would either be a failure to warn or it could be a defect in design or in the machine or it could be both of those, and we would just like you to indicate which of those you found in question No. 1

After answering question 2 then question 3 asks whether the plaintiff has shown by a fair preponderance of the evidence that the defect referred to in question 1 was a

substantial factor in causing his injury. I told you in the charge that not only must he prove the machine was defective, but he must also show that the defect was a substantial factor in causing his injuries. So if you answer this question no, again that would be the end of the case, and you would return to the courtroom.

But if you answer question No. 1 and question No. 3 yes, you would then naturally go on to question No. 4, which is the question about the defendant's claim of assumption of risk. Has the defendant shown by a fair preponderance of the evidence that Paul Green appreciated and assumed the risk which caused his injury, and you answer that yes or no.

You answer those four questions, the Court will be able to enter a verdict for one of the parties in this case.

If the verdict is in favor of the plaintiff, we will then continue on to the damage phase of the case. If it is for the defendant, of course, that's the end of the claim here today.

So you may now retire. You'll be in charge of Miss Brown.

(Ann Brown was sworn in as the bailiff.)

THE COURT: Ladies and gentlemen, we will assemble the exhibits and send them over to you. We won't send the machine in. If you want it, please let us know, and we will

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get it over there or allow you to come over here and look at it, which will probably be a lot easier.

Okay. You may now retire and begin your deliberations.

(The jury left the courtroom at 12:40 p.m.)

THE COURT: Gentlemen, did you indicate you wished to put something on the record at this juncture?

MR. MELILLO: First plaintiff wishes to object to a charge on the assumption of the risk for two reasons: (1) I believe it is the law that the defendant must appreciate the nature of the defect itself for assumption of the risk to apply, and the evidence in this case is that neither Mr. Green nor anybody else realized the machine was defective. Second, that he has to appreciate that the specific thing he was doing could lead to the harm, and there is no evidence that he appreciated that trying to stop the machine as he was doing could lead to the harm.

THE COURT: Okay.

MR. MELILLO: The second thing is I requested a charge on warnings whereby the plaintiff could recover if

the jury found that a warning increased the likelihood that the plaintiff would have changed his behavior.

The third thing I wanted to object to the charge on the employer's responsibility as not really being relevant to a 402-A claim.

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. . . upon a unanimous verdict?

THE JURY COLLECTIVELY: We have.

THE CLERK: Would you all please rise.

In the United States District Court for the Middle District of Pennsylvania, Paul Green, Plaintiff v. Bock Laundry Machine Company, Defendant, Civil Action No. 86-0688, verdict slip, question No. 1: Has plaintiff shown by fair preponderance of the evidence that the extractor manufactured by defendant in 1965 was defective when it left defendant's control? Your answer?

THE FOREMAN: No.

THE CLERK: Is that your answer, so say you all?

THE JURY COLLECTIVELY: Yes.

THE CLERK: Signed by the foreperson, James Holland. Dated May 13, 1987.

THE COURT: Ladies and gentlemen, this constitutes a verdict and also terminates your responsibility in connection with this case. On behalf of all of the litigants and the people involved in the case I wish to thank you very much for serving in this case.

These are not easy matters and sometimes not pleasant, but when eight disinterested citizens can agree on the questions that have to be resolved, I think we accept that as a fair resolution of the situation.

So I'm sure you found it interesting and we hope

* * * * *

PLEAD7. . .green motion for new trial/tld

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PAUL GREEN,

Plaintiff

v.

BOCK LAUNDRY MACHINE COMPANY,

Defendant

CIVIL ACTION—LAW
NO. CV-86-0688
JURY TRIAL DEMANDED

FILED
Harrisburg, PA
May 22 1987
[illegible]

PLAINTIFF'S MOTION FOR A NEW TRIAL

AND NOW, comes Plaintiff, Paul Green, by and through his attorneys, Angino & Rovner, P.C., and respectfully requests your Honorable Court to grant a new trial based upon the following:

1. The Court erred in denying Plaintiff's Motion in Limine, and Plaintiff's Evidentiary Objections, to the testimony of various fact witnesses as to what Paul Green was or was not told concerning how to use the machine in question.

2. The Court erred in denying Plaintiff's Motion in Limine to keep out evidence of Plaintiff's criminal record.

3. The Court erred in not asking Plaintiff's requested Voir Dire questions 6 and 7 which dealt with the potential prejudices of jurors concerning law suits.

4. The Court erred in charging the jury that in order to sustain his burden concerning a product defect on the basis of warnings, the Plaintiff had to prove that warnings would definitely have changed someone's behavior, rather than increased the likelihood that someone's behavior would have changed.

5. The Court erred in charging the jury concerning the employer's duty to maintain the subject machine.

Respectfully Submitted,
ANGINO & ROVNER, P.C.
s/ Joseph M. Melillo
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May 22, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYVLANIA

PAUL GREEN,

Plaintiff

v.

BOCK LAUNDRY MACHINE COMPANY,

Defendant

CIVIL ACTION—LAW
NO. CV-86-0688
JURY TRIAL DEMANDED

FILED
Harrisburg, PA
[illegible date]
Donald R. Berry, Clerk
Per [illegible]
Deputy Clerk

PLAINTIFF'S BRIEF IN SUPPORT OF THEIR MOTION FOR A NEW TRIAL

I. FACTUAL AND PROCEDURAL BACKGROUND

This case is currently before the Court upon the Motion of Plaintiff for a new trial. A verdict in favor of the defendant was rendered by a jury on or about May 13, 1987. In answering special Interrogatories, the jury found that the product in question, a Bock laundry extractor, was not defective.

Plaintiff has alleged five (5) grounds for a new trial, as outlined in their Motion for a New Trial. The fourth and fifth reasons go specifically to the issue of product defect,

and while the others do not, it is Plaintiff's position that the matters complained of could have posed such prejudice to Plaintiff's case that a new trial should be awarded.

Some factual background is in order.

On June 23, 1984, Paul Green was a nineteen year old employee at the Lemoyne Minit Car Wash, working for minimum wage on a prison work-release program. He had been hired six days previously, and it was his primary job to wipe cars dry after they were washed in the automatic washer. He was also asked to . . .

* * * * *

green brief in supp of motion/brief6/rap

. . . Paul Green was or was not told concerning how to use the machine in question?

3. Did the Court err in charging the jury that in order to sustain his burden concerning a product defect on the basis of warnings, the Plaintiff had to prove that warnings would definitely have changed someone's behavior, rather than increase the likelihood that someone's behavior would have change?

4. Did the Court err in charging the jury concerning the employer's duty to maintain the subject machine?

5. Did the Court err in not asking Plaintiff's requested Voir Dire Questions Nos. 6 and 7, which dealt with the potential prejudices of jurors concerning the liability crisis?

III. ARGUMENT

A. *It was error to introduce evidence of Plaintiff's criminal record.*

It is not Plaintiff's position that it was this Court's error to permit the introduction of evidence of Plaintiff Paul Green's criminal record, since pursuant to the Third Circuit's decision in *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984), this Court had no discretion in the matter. However, other circuits have taken a different view of the relevant Federal Rules of Evidence, *i.e.*, 609(a) and 403; see, *Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983) and *Shaw v. Red Eagle*, 695 F.2d 114 (5th Cir. 1983).

Obviously, in order to grant Plaintiff the relief requested in this case, the Third Circuit would either have to reconsider its reasoning in *Diggs, supra*, or the United States Supreme Court would have to resolve the conflict which currently exists concerning the interpretation of these rules. Plaintiff would like to add that nowhere is the unfairness of not permitting the lower court any discretion more apparent than in a case such as this, where the Plaintiff's arm was torn off by an allegedly defective machine, and the kind of crimes introduced include such matters as statutory rape.

B. *The Court erred in permitting various fact witnesses to testify concerning what Plaintiff was or was not told concerning how to use the machine in question.*

At the trial of this case, various fact witnesses testified that Plaintiff Paul Green was told that the machine was dangerous and to keep his hands out of the machine. Plaintiff disputed some of these statements, but was certainly prejudiced by their admission, regardless of whether or not the jury ever reached the issue of assumption of the risk. The natural inclination of the lay jurors would be to consider evidence of Plaintiff's negligence in determining whether or not to fault the Defendant manufacturer. This kind of evidence is inadmissible in . . .

PETITIONER'S

BRIEF

No. 87-1816

In the Supreme Court of the United States

Term, 198

PAUL GREEN,
Petitioner

vs.

BOCK LAUNDRY MACHINE COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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Petition for Certiorari Filed May 4, 1988
Certiorari Granted June 20, 1988

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 888-2244

ERRATA

Page 5, Line 21 (R. 141a = J.A. 30)
Page 5, Line 26 (R. 142a-143a = J.A. 31-32)
Page 6, Line 30 (R. 156a-160a, 185a = J.A. 45-50, 75)
Page 7, Line 1 (R. 169a = J.A. 58)
Page 7, Line 4 (R. 144a-145a, 153a = J.A. 33-34, 42)
Page 7, Line 6 (R. 161a-164a, 209a-211a, 213a = J.A. 50-54, 98-101, 102)
Page 7, Line 13 (R. 145a-146a, 214a = J.A. 33-35, 103)
Page 7, Line 15 (R. 214a = J.A. 104)
Page 7, Line 20 (R. 173a-177a = J.A. 62-67)
Page 8, Line 2 (R. 134a-217a = J.A. 23-107)
Page 8, Line 8 (R. 198a = J.A. 87)
Page 8, Line 9 (R. 144a-145a, 153a = J.A. 32-34, 42)
Page 8, Line 10 (R. 202a, 207a = J.A. 91, 96)
Page 9, Line 12 (R. 325a-326a = J.A. 114-115)
Page 9, Line 25 (R. 333a = J.A. 119)
Page 9, Line 32 (R. 49a = J.A. 13)
Page 11, n. 1, Line 11 (R. 171a = J.A. 60)
Page 11, n. 1, Line 13 (R. 171a = J.A. 61)
Page 11, n. 1, Line 18 (R. 73a-79a, 171a = J.A. 16-20, 60)
Page 11, n. 1, Line 21-22 (R. 201a-202a, 205a = J.A. 90-91, 94)
Page 29, n. 3, Line 6 (R. 317a = J.A. 111)

STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does Federal Rule of Evidence 609 mandate the admission of any felony conviction against a civil Plaintiff, so that in a tort action in which a nineteen-year-old victim lost his arm because of an allegedly defective machine, his credibility could be attacked by evidence that he had once had consensual sexual relations with an underage girl or that he had been involved in a burglary?

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Cases:

IN THE SUPREME COURT OF THE UNITED STATES

PAUL GREEN,

Petitioner

vs.

BOCK LAUNDRY MACHINE COMPANY,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

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Neil J. Rovner, Counsel of Record, and Joseph M. Melillo respectfully present this Brief for Petitioner to the Supreme Court of the United States.

CITATIONS TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The District Court for the Middle District of Pennsylvania issued an Opinion and Order, which have not been officially reported, and the Third Circuit Court of Appeals affirmed without opinion, 845 F.2d 1011 (3d Cir. 1988). The Slip Opinion and Judgment Order are reproduced in the Appendix to the Petition for Writ of Certiorari.

The Third Circuit Court of Appeals' Opinion in *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984) is also included in the Appendix to the Petition for Writ of Certiorari for the Justices' convenience.

JURISDICTION

The Third Circuit Court of Appeals entered its Order affirming the decision of the District Court for the Middle District of Pennsylvania on March 14, 1988. The Petition for Writ of Certiorari was filed within ninety (90) days of that date and the jurisdiction of this Court invoked under 28 U.S.C. §1254(1). The Supreme Court granted Certiorari on June 20, 1988.

STATUTES INVOLVED

Rule 609. Impeachment by Evidence of Conviction of Crime.

(a) General rule.—For purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Fed.R.Evid. 609(a).

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Fed.R.Evid. 403.

STATEMENT OF THE CASE

This product liability action was brought by the Plaintiff, Paul Green, against the Bock Laundry Machine Company for a tragic injury which Paul suffered on June 23, 1984. The case was tried before a jury in the Federal District Court for the Middle District of Pennsylvania and the jury rendered a verdict for the Defendant. Federal jurisdiction was predicated upon diversity of citizenship.

Several grounds for appeal were asserted, and these were denied by both the District Judge and the Third Circuit Court of Appeals. The only issue which Paul Green has brought before the Supreme Court is whether the Third Circuit Court of Appeals interpreted Federal Rule of Evidence 609 in a manner which is improper and proved devastating to his civil claim. Some discussion of the background facts will place this case in its proper context and illustrate just how unfairly the Third Circuit's interpretation of the Rule operated in his case.

On June 23, 1984, Paul Green was a nineteen-year-old employee at the Lemoyne Minit Car Wash, working for minimum wage. He had been hired six days previously (R. 141a), and it was his primary job to wipe cars dry after they had been washed in the automatic washer. He was also asked to replenish the supply of wiping cloths by laundering them in the car wash's own facilities, consisting of a washing machine, a Bock centrifugal water extractor and a dryer (R. 142a-143a). The extractor was a Bock M-100, manufactured in 1965, and it consisted of a perforated basket which rotated at approximately 1600 RPM on a

shaft connected to a motor in the unit's base. The water would be forced outward into a collecting tub, or curb, which drained the liquid through a pipe. The power on the machine was activated when the lid would be closed and the handle moved over it; a lug also moved into place under the lid to prevent its opening. When the handle was moved away from the lid, the power would be cut off. Moving the handle also increased tension on a spring connected to a brake, which was designed to bring the heavy, stainless steel basket to a stop within a reasonably short period of time (R. 237a-240a; 384a-392a).

According to the manufacturer's records, the extractor was designed with a safety device which prevented the lid from opening until the brake had stopped the machine completely. This safety device was dependent upon an external cable which connected the handle and lid with a mechanism inside the machine's base (R. 237a-240a; 384a-392a). The design was one which had been pioneered decades earlier, and which Bock had used until the late 1970's, although more modern safety systems had been designed much earlier, and in fact were used by Bock in other models (R. 245a-249a).

It was undisputed in this case that at the time of the accident both the safety device and the machine's internal brake were non-operational, and the lid could be opened while the centrifuge continued to spin at its maximum rate. Additionally, the basket would take fifteen (15) minutes, rather than a few seconds, to stop completely. No one, including the then owners of the machine, realized that this was in any way unusual (R. 156a-160a; 185a).

According to the car wash owner, employees were told not to place their hands in the extractor when it was

spinning (R. 169a). According to Paul Green, other employees told him to wrap a towel around his hand and place it with pressure on the center spindle in order to slow the basket (R. 144a-145a; 153a). The owners admitted that the demand for towels was very great when the car wash was busy (R. 161a-164a; 209a-211a, 213a), and another of their employees admitted that others, besides Paul Green, had used different methods to slow the machine.

On June 27, Paul was trying to slow the machine in just this manner. The towel wrapped around his wrist apparently became entangled with the perforated basket, and it tore his arm completely off, at the shoulder (R. 145a-146a; 214a). Nearby employees saw Paul Green fall to the floor, while his right arm continued to bounce around in the centrifuge (R. 214a).

The machine was subsequently disassembled, and it was found that the inner drum had abraded the outer curb, permitting water to fall onto the brake and safety mechanism. They became very corroded and frozen (R. 173a-177a). The safety cable had either been severed at some point prior to the present owner's acquisition of the business in 1968, or had never been installed properly by the factory, because examination of the machine showed it to be missing, also.

The proof in this case centered on the question of whether or not the machine's safety features were defectively designed and whether it was equipped with adequate warnings. Experts testified extensively on both sides (R. 256a-301a; 303a-310a; 340a-396a).

The technical testimony provided by the parties' experts and Thomas Clement, President of Bock Laundry Machine Company, comprises nearly two-thirds of all the

testimonial evidence. Even the fact witnesses who testified (R. 134a-217a) were questioned primarily about how the extractor or the car wash facility operated at the time of the accident. The only issue of credibility concerned what instructions Paul Green had been given about the machine's operations and dangers. The facts on this issue most favorable to each party were duly elicited from the lay witnesses (See testimony of Delores Kelly, R. 198a; Paul Green, R. 144a-145a, 153a; Theresa Wissler, R. 229a-230a; Martin Shetrom, R. 202a; and John Emerick, R. 207a.)

It should be noted that under Pennsylvania law, contributory negligence is not a defense in a product liability case. *See: McCown v. International Harvester Company*, 463 Pa. 13, 342 A.2d 381 (1975). Evidence of what Paul Green was told concerning the machine's dangers is relevant only with regard to two issues: assumption of the risk and the adequacy of warnings. Assumption of the risk is a special defense which requires the defendant to prove that the injured party was actually aware of a product's defect and resulting dangers, and that he willingly chose to encounter that known risk. *See: Ferraro v. Ford Motor Company*, 423 Pa. 324, 223 A.2d 746 (1966). The jury did not render its verdict based upon assumption of the risk (R. 338a).

The inadequacy of a product's warnings is one basis, in Pennsylvania, upon which the plaintiff may predicate liability. *See: Berkebile v. Brantly Helicopter Corporation*, 462 Pa. 83, 337 A.2d 893 (1975); *see also Conti v. Ford Motor Company*, 743 F.2d 195, 197-198 (3d Cir. 1984), in which the issue was defined as whether the existence of an adequate warning may have prevented the accident. The

District Court in this case charged the jury on the warnings theory as follows:

> In determining if a warning should have been given by the defendant in some particular form or a way not shown in the evidence, you must inquire whether an average or reasonable user would require a specific warning about the danger complained of. Thus you may decide whether plaintiff would have been injured if a warning had been present on the machine; that is, whether Mr. Green would have heeded a warning not to reach into the moving drum.

(R. 325a-326a)

Thus, the jury was forced to consider whether Mr. Green would have modified his behavior if confronted by a manufacturer's warning. In so deciding, the jurors may also have considered the lay testimony of what Paul Green was or was not told about the machine's operations. If in resolving and harmonizing differences in the lay testimony, the jurors concluded that Paul had received explicit information concerning the hazard of slowing the centrifuge as he did, they may have further concluded that a manufacturer's warning would have gone unheeded and was therefore unnecessary. The jury actually found that the machine was not defective on either a design or warnings basis (R. 338a).

In other words, this case contained a limited credibility issue with regard to one of two liability theories and one defense. Despite the availability of ample lay testimony on this limited credibility issue, Plaintiff anticipated that the defense would introduce his prior criminal record into evidence to "impeach him." Plaintiff filed a Motion in Limine with the Court pre-trial (R. 49a) and this Motion admitted

that he had been convicted of three felonies, i.e., statutory rape, conspiracy to commit burglary and burglary. The Motion also admitted to one possible felony, criminal trespass, and one misdemeanor charge, corruption of the morals of a minor. Plaintiff also frankly admitted in the Motion that the District Court was bound by the panel decision of the Third Circuit in *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984), in which two of the judges interpreted Federal Rule of Evidence 609(a) to give the District Court *no discretion* in deciding whether the probative value of such evidence was outweighed by its prejudicial effect in a civil proceeding.

The majority of the panel admitted that its decision was not in keeping with that of the Eighth Circuit in *Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983) or the Fifth Circuit in *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir. 1983), and also admitted that such an interpretation could lead to unfair results; *see Diggs*, 741 F.2d at 582.

The *Diggs* case was appealed to the United States Supreme Court, which refused to grant certiorari, although three Justices dissented, noting the conflict in interpretation which the Rule has received among the Circuits, and the potential unfairness of the Third Circuit decision; *See Diggs v. Lyons*, 471 U.S. 1078, 85 L.Ed.2d 513, 105 S.Ct. 2157 (1985) and the dissenting opinion of Justices White, Brennen and Marshall. In a prior case, *Furtado v. Bishop*, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035, 62 L.Ed.2d 672, 100 S.Ct. 710 (1980), the United States Supreme Court had also declined to consider the issue.

Because the Trial Judge was bound by the Third Circuit's ruling in *Diggs*, such evidence was received by the

jury.[1] It is Paul Green's position that what little probative value his criminal record may have had was eliminated by the technical nature of the claims and defenses of this product liability case, and by the existence of ample lay testimony upon those credibility issues which did exist. Evidence of Paul Green's criminal record served to smear his reputation, not enlighten the jury on the parties' claims and defenses. However, given the Third Circuit's decision in *Diggs*, the District Court could not decide that the prejudicial effect of this evidence outweighed its probative value and therefore exclude it from evidence.

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[1] *See* cross-examination of Paul Green, R. 152a, in which he admits to the burglary and conspiracy to commit burglary convictions, and to receiving consecutive sentences for these offenses. It should be noted that Paul Green was not cross-examined about his statutory rape charge, although the defense did bring this offense to the jury's attention in the opening address of counsel. Although the openings were not transcribed, this fact is preserved by inference in a side-bar conference, subsequent to Mr. Green's testimony, in which defense counsel argued that he should also have been able to introduce the misdemeanor corruption of the morals of a minor charge "that was a companion charge to the statutory rape charge." (R. 171a) Plaintiff took the opportunity, at that time, to reiterate his objection to the introduction of *any* portion of his criminal record (R. 171a). The defense also conceded that the trial court admitted all prior convictions, except the corruption of the morals of a minor charge. *See*: Defendant's Brief in Opposition to Petition for Writ of Certiorari, page 2. The defense had steadfastly maintained its right to introduce Mr. Green's entire record into evidence under 609(a)(1) both prior to and during the course of the trial (R. 73a-79a; 171a).

It should be noted that the defense availed itself of the opportunity of impeaching not only Mr. Green, but also his co-workers, called as *defense* witnesses, concerning their prior felony convictions. (*See* R. 201a-202a, 205a.) It is evident that the defense was attempting to draw the jurors' attention away from the highly technical product liability issues and towards questions about the character of the Plaintiff and of the people with whom he associated.

SUMMARY OF THE ARGUMENT

Appellant Paul Green believes that neither the express language of Rule 609, nor its legislative history evidences any intent on the part of Congress to abrogate a trial court's discretion to exclude evidence of a civil party's criminal record. In construing a law, the first order of business is to examine the statute itself. If its language is unambiguous, that language is conclusive and analysis ordinarily ends.

The Rule in question is obviously ambiguous when applied in civil actions. Attempts to apply the clause "prejudicial effect to the defendant" to various civil scenarios prove hopeless.

Since the Rule is ambiguous, one turns next to the legislative history. The record of Congress' debates and Committee hearings reveals a bitter dispute concerning the deference owed to the criminal defendant. The rule was redrafted and amended many times, and the final version was crafted by a conference committee convened to resolve lingering disputes between the House and Senate.

Although the legislative record is devoid of any meaningful discussion of Rule 609's application to civil cases, a panel of the Third Circuit in *Diggs* concluded (with one dissent) that Congress' silence proved its intent that the Rule be the sole guide, in both civil and criminal matters, with respect to the admission of impeaching felonies; and since the Third Circuit interpreted the Rule to provide discretion only with respect to the criminal defendant's felonies, it concluded that felonies are automatically admissible against a civil party or witness.

The Third Circuit's analysis is not supported by reference to appropriate rules of statutory construction. It is dangerous to discern Congress' intent from silence. In the absence of express Congressional findings, a law should be construed not to vary the common law except to the extent that a change plainly appears in its language; not to conflict with expressions of policy contained in companion statutes; not to promote disfavored practices, such as forum shopping; and finally—and most importantly—to promote justice and fair dealing.

An analysis of the issue shows that the civil trial judge must be left with some discretion to satisfy these values. The vast majority of courts which have considered the same issue agree, although they differ on the latitude the trial court should retain, i.e., the relatively large measure of discretion which the balancing test contained in Rule 609 provides, or the more measured powers meted out under Rules 102, 403 and 611. These differences in opinion reflect the lack of express Congressional guidance on the issue.

Appellant believes that the interests of civil litigants are best served by maximizing judicial discretion.

ARGUMENT

A. Neither the Express Language of F.R.E. 609, nor the Legislative Record Supports the Interpretation of 609(a)(1) Which the Third Circuit Reached in *Diggs v. Lyons*. Standard Principles of Statutory Construction, Applied to Rule 609, Require a Finding That the Civil Trial Court Retains Significant Control Over the Admission of Impeaching Felonies Into Evidence

The most fundamental of all rules of statutory construction is that analysis begins with the language of the statute itself. Unless otherwise defined, words are to take their common meaning. *See: Perrin v. U.S.*, 444 U.S. 37, 42, 62 L.Ed.2d 199, 204, 100 S.Ct. 311, 314 (1979); *Southeastern Community College v. Davis*, 442 U.S. 397, 405, 60 L.Ed.2d 980, 987, 988, 99 S.Ct. 2361, 2366 (1979). Unambiguous statutory language is ordinarily deemed to be conclusive. *See: TVA v. Hill*, 437 U.S. 153, 184, 57 L.Ed.2d 117, 140, 98 S.Ct. 2279, 2296 (1978), although resort to legislative history is not forbidden when a clear intent may be discerned from that source. *See: Harrison v. Northern Trust Company*, 317 U.S. 476, 479, 87 L.Ed. 407, 410, 63 S.Ct. 361, 363 (1943).

Thus, the first inquiry is whether Rule 609(a) is in fact unambiguous. The Rule states:

> (a) General Rule—For purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

The crucial question is what the words "prejudicial effect to the defendant" mean. In criminal litigation, these words obviously refer to the accused, rather than other witnesses. However, their meaning in the civil context is far from clear.

A typical civil lawsuit will begin with one or more plaintiffs and a single or multiple original defendants. Any of the defendants may counterclaim against the plaintiffs, add third party defendants, and file crossclaims against each other. Under some circumstances, parties with a significant interest in the litigation's outcome may intervene. Given this common line-up of civil parties, precisely who may object to the admission of evidence of their felonies? For example, does the defendant who lodges a counter or crossclaim relinquish any protection which Rule 609 would otherwise afford?

The statute is obviously ambiguous in its application to civil parties, and additional principles of statutory construction must therefore be invoked. The overriding concern is, of course, to discern Congress' intent in enacting the law. This search necessarily turns first to relevant legislative history, *see: U.S. v. Turkette*, 452 U.S. 576, 580, 69 L.Ed.2d 246, 101 S.Ct. 2524, 2527 (1981), although other factors also deserve consideration. Thus, an attempt should

be made to harmonize any statutory interpretation with the purpose of the statute. *See: Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 118, 74 L.Ed.2d 845, 858, 103 S.Ct. 986, 995 (1983). Individual sentences or phrases shall not be read in isolation, and reference must be made to the overall object and policies which the law seeks to foster: *National Labor Relations Board v. Lion Oil Company*, 352 U.S. 282, 288, 1 L.Ed.2d 331, 337, 77 S.Ct. 330, 334 (1957); *Mastro Plastics Corporation v. National Labor Relations Board*, 350 U.S. 270, 100 L.Ed. 309, 321, 76 S.Ct. 349, 359 (1956). Thus, even though a literal reading is within the letter of a statute, it may not be within the statute because it is not within its spirit. *United Steelworkers of America, etc. v. Weber*, 443 U.S. 193, 201, 61 L.Ed.2d 480, 488, 99 S.Ct. 2721, 2726 (1979).

Moreover, statutes should be construed to avoid unnecessary hardship, absurd results or injustice whenever possible. *See: United States v. Dow*, 357 U.S. 17, 25, 2 L.Ed.2d 1109, 1116, 78 S.Ct. 1039, 1046 (1958); *Sorrells v. United States*, 287 U.S. 434, 446, 77 L.Ed. 413, 417, 53 S.Ct. 210, 214 (1932); *Burnet v. Guggenheim*, 288 U.S. 280, 285, 77 L.Ed. 748, 751, 53 S.Ct. 369, 371 (1933).

It has also been held that undue reliance should not be placed upon the comments of individual legislators, especially the opponents of the legislation. *See: Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204, 47 L.Ed.2d 668, 683, 96 S.Ct. 1375, 1386 (1976); *Chrysler Corporation v. Brown*, 441 U.S. 281, 311; 60 L.Ed.2d 208, 231, 99 S.Ct. 1705, 1722 (1979). It is also considered dangerous to rely unduly on Congressional silence in adopting a controlling rule of law. *See: NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116, 129-130, 30 L.Ed.2d 312, 323, 92 S.Ct.

360, 369 (1971), relying upon *Girouard v. United States*, 328 U.S. 61, 69, 90 L.Ed. 1084, 1090, 66 S.Ct. 826, 830 (1946); *Boys Markets, Inc. v. Retail Clerks Union*, 398 U.S. 235, 241, 26 L.Ed.2d 199, 204, 90 S.Ct. 1583, 1587 (1970). A corollary to this rule is that Congress should not be found to abrogate the prior practice, largely consisting of judge-made law, without doing so explicitly. *See: Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 61 L.Ed.2d 521, 99 S.Ct. 2753 (1979).

The history of Rule 609, beginning with several versions considered by the Advisory Committee on Rules of Evidence of the Judicial Conference of the United States, is tortuous and ultimately reflects a bitter division in the Congress concerning the deference owed to the criminal defendant.

As the history of Congressional Action, *supra*, on Rule 609(a) indicates, the rule went through a great number of revisions before reaching its final form. The controversy engendered is attributable to the subject matter of the rule which involves two, sometimes conflicting, ends of the criminal law—safeguarding the innocent and punishing the guilty. Permitting unlimited use of defendant's criminal past for impeachment undoubtedly results in more convictions; it also increases the likelihood that a person will be found guilty who, this time at least, has not committed a crime. Limiting the use of convictions for impeachment provides more protection for the innocent, but it also raises the spectre of the guilty out on the streets because the jury has been denied information helpful in evaluating the credibility of witnesses. See Discussion in §609[02].

> Uncertainty on how to resolve this dilemma was felt not only by Congress but also by the Advisory Committee—the text of Rule 609 went through three distinct stages representing different proposed solutions, before the rules were transmitted to the Supreme Court.

Weinstein's Evidence, J. Weinstein and J. Berger, V. 3, 1982, Commentary to §609[01], p. 609-46 (footnotes omitted).

The Advisory Committee's initial draft supposedly restated the traditional rule, that impeachment by a felony or offense crimen falsi was allowed. A second draft was more innovative, and included a provision that evidence of felonies was admissible "unless the judge finds that the conviction is lacking in probative value on the issue of credibility." *See: Weinstein's Evidence*, J. Weinstein and J. Berger, V. 3, 1982, p. 609-47 (hereinafter "*Weinstein's Evidence*"). The Committee on Rules of Practice and Procedure further restricted the Rule's operation by excluding evidence of felonies if "the judge determines that the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice." *See: Weinstein's Evidence, supra*, pp. 609-47 through 48. This is similar in its approach to that reached by the District of Columbia Circuit in the 1965 Opinion of *Luck v. U.S.*, 348 F.2d 763 (1965).

Congress, however, had exercised its prerogative to overrule *Luck* in a 1969 statute applicable to the District of Columbia, and certain members of Congress quickly voiced their displeasure at what appeared to be a disregard for Congress' will. *See: Weinstein's Evidence, supra*, pp. 609-46 through 609-52. The Advisory Committee duly responded with a return to its original draft. *See: Weinstein's Evidence, supra*, p. 609-52.

However, the debate was renewed once the Rules reached the House and Senate. It is, in fact, at this point that Judge Maris, writing for the two-judge majority in *Diggs*, begins a summary of the legislative history. That summary forms the predicate for the Third Circuit's ruling in *Diggs* and needs to be studied carefully.

Judge Maris indicates initially that the final Advisory Committee Rule "followed the weight of traditional authority which allowed the use of felonies generally without regard to the nature of the particular offense. . . ." *Diggs*, 741 F.2d at 579. He therefore concludes that the Rule as submitted to Congress left no discretion to the trial judge, since it mirrored the prior practice.

This proposition is open to serious dispute. For example, Judge Friendly, in testimony before the special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary, House of Representatives (93rd Congress, First Session, Serial No. 2), indicated that under the traditional practice, felonies were generally admissible. However, he notes "[b]ut, of course, there is the overriding rule that the judge can always exclude testimony where probative value he thinks is outweighed by its prejudicial effect. . . ." (pp. 251-252) When asked if the proposed set of Rules permitted similar discretion, Judge Friendly indicated that he believed a general rule providing discretion did exist. Representative Hungate then brought proposed Rule 403 to his attention. Judge Friendly's response was clearly prescient:

> JUDGE FRIENDLY. I think the Congressman's point is a good one. You have the problem: Does that

> apply when there is a specific rule on the subject? This just says relevant evidence may be excluded if it has this effect. But then somebody is going to argue, this other rule dealt very specifically with the question and rule 403 is out. I don't know what the answer would be. It is just another illustration that this code, far from settling problems, creates a great many of them.

Special Subcommittee Hearings, 93rd Congress, First Session, on Proposed Rules of Evidence, Serial Number 2, pp. 238-233. (1973). *See also Weinstein's Evidence, supra,* pp. 609-7 through 609-11, which excerpts relevant portions of the testimony.

Under the prior practice, Federal Judges received evidentiary guidance from several sources. They would look first to Federal statutes, equity cases and rules for specific guidance. They were also directed to Federal Rule of Civil Procedure 43, which was quite general in nature, although it was said to have a bias towards admissibility. Thereafter, Courts looked principally to the law of the forum in which they were situated. *See 10 Moore's Federal Practice,* Section 5[4.-1], pp. 26-28. The prior practice was an amalgam of approaches which were largely judge created and can be characterized as a kind of Federal Common Law. Judge Maris himself testified before the Special Subcommittee and confirmed the "great latitude" enjoyed by trial judges in their rulings on admissibility in the Federal system under the prior practice. *See* Special Subcommittee Hearings, cited *supra,* at page 32. *See also Luck v. U.S., supra.*

The appropriate question is not whether the common law absolutely precluded judicial discretion—it clearly did not—but whether the new Federal Rules intended to work this change in the traditional practice.

Judge Maris continues, in *Diggs,* with a recitation of the treatment Rule 609 received in Congress.

> In the Congress diverging views developed. There were three schools of thought. (1) That evidence of all felonies and crimen falsi should be admitted without any weighing procedure. This was what had recently been enacted by the Congress for the District of Columbia. It represented the plan embodied in the rule as submitted to the Congress by the Supreme Court and it was urged in the House by Representative Hogan and in the Senate by Senator McClellan. (2) That evidence of crimen falsi should be freely admissible but that the weighing procedure should be applied in the case of felonies other than crimen falsi. This point of view was advanced by Representative Smith in the House. It was adopted by the House subcommittee, but rejected by the House Judiciary Committee and the House. . . . (3) That evidence of crimen falsi alone should be admissible. This view was advanced by Representative Dennis and the House Judiciary Committee and was the version adopted by the House which voted down positions (1) and (2).

When the rule came to the Senate, the Judiciary Committee proposed a compromise. With respect to defendants, only convictions of crimen falsi might be used. With respect to other witnesses, convictions of felonies might also be used subject to the balancing test. On the floor of the Senate Senator McClellan offered an amendment providing for admission of all fel-

onies and crimen falsi with no balancing test, in effect, the version originally prepared by the Advisory Committee and forwarded by the Supreme Court. Senator McClellan's amendment was adopted by the Senate. Thus, the Conference Committee of the two houses was presented with a House draft permitting only crimen falsi to be admitted and a Senate draft which made all felonies freely admissible in addition to crimen falsi.

The present form of Rule 609(a) is the compromise between the two houses proposed by the Conference Committee. Its effect was to accept the McClellan amendment which the Senate had adopted, with the modification that the weighing test be applied to the admission of felonies but only with respect to the "prejudicial effect to the defendant". In their report the conferees on the part of the House stated:

> With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect *to the defendant*. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is out-weighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

Diggs v. Lyons, 741 F.2d at pp. 579-580 (footnotes omitted).

From this, the Court concludes that Congress essentially adopted the Senate version of the Rule, which embodied the final Advisory Committee draft, except that the criminal defendant could be afforded some protection under the balancing provision grafted to the Advisory Committee version. *See: Diggs*, 741 F.2d at 580. This conclusion is also suspect, since Representative Hungate, who chaired the conference committee which drafted the final compromise Rule, opined that the final Rule struck a middle ground, "but a ground as close or closer to the House version than to the Senate's." 120 Cong. Rec. H40891 (statement of Rep. Hungate). While the comments of individual legislators do not conclude legislative analysis, *See: Ernst & Ernst v. Hochfelder, supra*, the beliefs of the conference committee chairman deserve some weight.

Judge Maris then turns his attention to the applicability of the Rule in the civil sphere. He cites brief statements of Representatives Hogan, Wiggins, Lott and Dennis, which supposedly indicate their belief that the Rule would apply to civil cases as well as criminal proceedings. The Judge then indicates that he "find[s] no suggestion in the legislative history by anyone that Rule 609(a) did not apply to civil cases . . ." *Diggs*, 741 F.2d at 581. Implicit in the Court's decision is the belief that *only* Rule

609(a) would govern the admissibility of impeaching offenses to parties and witnesses in civil cases.

Judge Maris continues his analysis with a study of Rule 403, and the criminal cases which have discussed its relationship to Rule 609. These cases generally hold that Rule 403 has no applicability, e.g. with respect to modifying the automatic admission of crimen falsi offenses, since Rule 609 is a more specific pronouncement of Congressional intent. *See: U.S. v. Wong*, 703 F.2d 65 (3d Cir. 1983). Following this piece of analysis, Judge Maris can then complete his argument: since Rule 609 is equally applicable to civil and criminal cases, and because 609 is a more specific rule than 403, then only Rule 609 applies in civil cases. Moreover, since Rule 609 contains no balancing test in deciding to admit felonies against civil litigation witnesses, the judge in a civil trial is without discretion to exclude such evidence.

Judge Maris agrees "that the mandatory admission of all felony convictions on the issue of credibility may in some cases produce unjust and even bizarre results." *Diggs*, 741 F.2d at 582. However, the majority in *Diggs* was evidently convinced that Congress intended to enact a Rule which operated in this manner.

The civil litigant is, if anything, in a worse position under this interpretation of the Rule than under the prior practice. Then, the plaintiff or defendant (or even a disinterested witness—perhaps subpoenaed to provide factual testimony) had some hope of avoiding impeachment for unrelated offenses not crimen falsi. However, Congress, though almost entirely ignoring the civil litigant in hundreds of pages of debate and committee reports, intended (Judge Maris believes) to abrogate every last vestige of judicial discretion. At the same time, Congress decided to markedly enhance the protection which could be afforded to a criminal defendant.

If Congress clearly intended this result, civil parties would have no choice but to accept it, however unfair. Fortunately, principles of statutory construction do not require the conclusion that Rule 609 was intended to be the exclusive standard for judging admissibility of impeachment evidence in civil cases.

First, and foremost, Congress' intent should not be discerned from what amounts almost entirely to silence on civil issues. *See: NLRB v. Plasterers' Local Union, supra.* The Congressional debate was consumed almost exclusively with the difficult question of how to treat the criminal defendant and witnesses.

Even Judge Maris' citations are arguably taken out of context. One commentator, who carefully studied the statements of Representatives Lott, Dennis, Hogan and Wiggins, concluded that taken in context they did not reflect a legislative intent that Rule 609(a) apply equally to civil and criminal trials. *See:* Smith, "Impeaching the Merits: Rule 609(a)(1) and Civil Plaintiffs", 13 No. Kentucky L.R. 441, 447-452.

The conference committee report is devoid of reference to civil concerns, and addresses itself to the problems of impeaching the criminal defendant. *See: Diggs*, 741 F.2d at 580, quoted previously. *See also Smith*, cited *supra*, at 454; and H.R. Cong. Ref. No. 1597, 93rd Congress, Second Session, 9-10, reprinted in 1974 U.S. Code Cong. & Ad. News 7051.

Perhaps the most telling comment on Congressional disregard of the civil litigant comes from the dissent in *Diggs*:

> The snippets of legislative history in which four Members of Congress anticipated that some court might reach so ridiculous a result, 120 Cong.Rec. 2377, 2379, 2381, do not persuade me that the result was intended by Congress. The overwhelming weight of the legislative background material on Rule 609 suggests a preoccupation by Senator McClellan and others with defendants in criminal proceedings. The result was, in my view, a legislative oversight as to the legislation's effect upon civil plaintiffs. By the time the oversight was recognized by Congressmen Dennis, Hogan, Wiggins and Lott legislative fatigue had set in, and the resulting ambiguity in Rules 403 and 609(a) was left unresolved.

Diggs, 741 F.2d at 583.

Another important principle of statutory construction is that statutes in derogation of the common law ought to be strictly construed. *See: Edmonds v. Compagnie Generale Transatlantique, supra*. In varying the traditional practice, Congress' intent should not be given a broader sweep than plainly appears in either the language of the statute or the legislative history. Thus, in the absence of explicit language disclosing an intent to eliminate every last vestige of judicial discretion in civil trials, Rule 609 should not be construed to accomplish that end.

Furthermore, Congress should not be held to enact laws which are in conflict with policy, expressed in other parts of the same act, which create gross inequities, or which otherwise fail to promote recognized legal values.

See: citations on page 16 of this Brief. Rules 102, 403 and 611 clearly evidence an intent to provide the trial judge such discretion as is necessary to effect justice. These clear pronouncements of policy should not be ignored in the absence of evidence that Congress clearly intended that result.

The *Diggs* Court's interpretation of Section 609(a) would also promote forum shopping. For example, a plaintiff with a criminal record who initiates a civil action in State court against a foreign defendant cannot prevent the case from being removed to Federal court, even if the only purpose for the removal is to assure that his record be admitted into evidence.

The Pennsylvania Supreme Court takes a very restrictive approach towards admitting evidence of prior convictions to impeach. Only offenses involving dishonesty are potentially admissible, and then only if the probative value of the evidence outweighs its prejudicial effect. *See Commonwealth v. Bighum*, 452 Pa. 554, 307 A.2d 255 (1973). The same standard has been held to apply in civil cases. *See Carlson Mining Company v. Titan Coal Company, Inc.*, 343 Pa. Superior Ct. 364, 494 A.2d 1127 (1985). A Federal court sitting in Pennsylvania, operating under the pre-Rules of Evidence Practice, may well have felt constrained to apply such a narrow standard for admissibility in diversity cases.

Finally, an evidentiary rule which provides the trial judge no discretion in civil matters is patently unfair.[2] The

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[2] *See Foster, "Rule 609(a) in the Civil Context: A Plea for Precision and a Recommendation for Reform"* 57 Fordham Law Review 1. This work exhaustively compiles and studies the genesis of Rule 609, the judicial response to the Rule and ultimately the unfairness of impeaching the

civil plaintiff, unlike the criminal defendant, has the burden of proof and must normally testify, putting his credibility into issue. If he chooses not to take the stand, the defendant can call him as a witness and interrogate him with leading questions (F.R.E. 611); and in Federal practice, any witness, not just an opponent or adverse witness, is subject to impeachment (F.R.E. 607). Thus, a party is given maximum latitude to vilify his opponent's character not only directly but by association. Regardless of how the convictions are characterized, the jury will see them as (bad) character evidence. This is unfortunate, since under the Federal Rules character evidence to prove conduct is relevant, if at all, only in criminal proceedings. *See* F.R.E. 404.

The civil litigant is hardly bereft of impeachment devices. He is entitled to take the pretrial deposition of his adversary and force him to answer written questions as well, and these extra-judicial statements are available at trial for impeachment purposes. Indeed, they are potentially available as evidence independent of any trial testimony of the party providing them. *See*: F.R.C.P. 30, 32, 33. When cross-examined by the opposition, the civil litigant can be impeached by evidence on any non-collateral matter. Ironically, the automatic admission of felonies adds little if anything to the analysis of credibility which can be performed with other litigation tools.

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civil litigant with evidence of prior convictions. The article contains numerous examples of how such impeachment is especially detrimental in civil cases, and refers to the large body of social psychological research which supports the argument that jurors utilize such impeaching evidence to disparage the witness' character. The discussion which follows is a brief synopsis of some of the observations contained in this article.

The real purpose of introducing evidence of a criminal record is not to impeach the plaintiff's credibility, but his worth. He is before a jury asking for money; he has the burden of proving both the defendant's liability and the extent of his damages before recovery might be had. His "worthiness" to receive adequate compensation, which can include very large sums of money, is very much at issue.

It is a mistake to believe that the devastating effect on this evidence can be corrected with "curative" instructions. The Courts have recognized that jurors are unable to perform the mental gyrations needed to separate a person from his prior deeds. *See Bighum, supra*, stating the Pennsylvania view. *See also Boyer v. Chicago and North Western Transportation Company*, 603 F. Supp. 132 (D.Minn. 1985) where the Court states that admitting Boyer's convictions "could only serve to poison the minds of the jurors by arousing their punitive instincts thereby diverting their attention from the issues that are central to this action." *Boyer*, 603 F. Supp. at 134.[3]

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[3] In the present case, the Court's corrective instructions consisted of a brief statement, in the charge to the jury, that evidence of prior convictions was not meant to prejudice a party or witness but to provide information concerning his credibility. The trial court also cautioned the jury that conviction of a crime does not in itself prove that a witness will lie. (*See* R. 317a.)

B. The Overwhelming Weight of Judicial Authority Confirms That Congress Did Not Mean To Extinguish Judicial Discretion When it Enacted Rule 609

The Courts which have considered the effect of 609(a)(1) in civil cases nearly all agree that Congress did not intend to eliminate all judicial discretion. They differ, though, in their assessment of the latitude which the trial judge possesses. These differences reflect a lack of Congressional guidance on the issue. Cases from the Fifth, Sixth, Seventh, and Eighth Circuits all appear to apply the 609(a) balancing test available "to the defendant" to all civil parties and witnesses. *See Petty v. Ideco*, 761 F.2d 1146 (5th Cir. 1985), in which the Court indicates that a civil plaintiff may benefit from the Rule's discretionary clause; *Howard v. Gonzales*, 658 F.2d 352 (5th Cir. 1981), in which the same result is reached with respect to a non-party witness; *Murr v. Stinson*, 752 F.2d 233 (6th Cir. 1985) (balancing test applied to a civil defendant); *Lenard v. Argento*, 699 F.2d 874 (7th Cir. 1983) (balancing test utilized with respect to civil plaintiff); *Calhoun v. Baylor*, 646 F.2d 1158 (6th Cir. 1981) (balancing test utilized in determining admissibility of evidence against the defendant in a fraud action).

The balancing test contained in Rule 609(a) affords a party or witness greater protection than the general principle of fairness contained in Rule 403. The former excludes evidence of felony convictions if their prejudicial effect "outweighs" their probative value. The latter does not exclude them unless the offensive evidence is "substantially outweighed" by the danger of unfair prejudice. The justification implicit in these decisions is that in modifying the

prior practice, Congress examined the impeachment doctrine with an eye towards restricting it; and the apparent prohibition against balancing except with regard to the defendant applies only to other witnesses in a criminal proceeding. The intent was to grant a criminal defendant maximum protection in criminal litigation, but not to deny these safeguards to civil witnesses and litigants.

A second group of cases decline to find that Rule 609(a)(1) confers discretion on the civil trial judge and hold instead that convictions deemed unduly prejudicial may be excluded under Rule 403. *See Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983); *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir. 1983); *Diaz v. Cianci*, 737 F.2d 138 (1st Cir. 1984); *Radtke v. Cessna Aircraft Company*, 707 F.2d 999 (8th Cir. 1983). It should be noted that several Circuits, e.g., the Fifth and Eighth have found judicial discretion in both approaches.[4]

The thrust of all these decisions is that nothing in either the Rule or the legislative history indicates an intent to make Rule 609(a)(1) the *sole* criterion for admitting evidence of felonies in civil cases. Therefore, the overarching policy expressed in Rules 102, 403 and 611 remain applicable. *See also Boyer*, cited *supra*, and *Moore v. Volkswagenwerk*, 575 F. Supp. 919 (D.Md. 1983); *Tussel v. Whitco Chemical Corporation*, 555 F. Supp. 979 (W.D. Pa. 1983), superceded later by *Diggs*. *See also Note, "Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403"*, 54

[4] In an older decision, *NLRB v. Jacob E. Decker and Sons*, 569 F.2d 357 (5th Cir. 1978), the Circuit seemed to take a position closer to that announced by the *Diggs* Court, but obviously changed its mind later. *See also Garnett v. Kepner*, 541 F. Supp. 241 (M.D. Pa. 1982).

Ford.L.Rev. 1064 (1986) in which the author concludes that in civil cases, Rule 403 should be invoked to exclude prejudicial convictions.

Ironically, another District Court in the Third Circuit felt compelled, even *following Diggs*, to explain that under Rule 609(a) the trial judge should be able to perform a balancing test in civil cases. The judge reasoned that the "defendant" is the individual against whom the impeaching conviction was obtained, i.e., the defendant in the collateral criminal matter. *See: Green v. Shearson Lehman/American Express, Inc.*, 625 F. Supp. 382 (E.D. Pa. 1985)

CONCLUSION

Examination of Rule 609's express language, relevant legislative history, and the judicial decisions interpreting it, all show that Congress did not mean to extinguish judicial discretion when it enacted Rule 609. Nearly all the interpreting Courts discern no evidence that Congress even studied, much less decided the fate of the civil litigant from that portion of the legislative record devoted to the impeachment rule. Those Courts which read an innovative viewpoint into the Congressional debate have decided that Congress most likely preferred the civil litigant to enjoy the same protection as the criminal defendant. Other Courts take the approach that the only fair reading of Rule 609 is that its balancing test applies solely to the criminal defendant, and the trial judge must resort to the more general provisions of Rules 102, 403 and 611 for sources of judicial discretion. Very few Courts, most notably the Third Circuit in *Diggs*, take the position that Congress' silence about whether 609(a) was meant to be the exclusive test of admissibility in civil cases means that it is. However, that construction comports neither with standard principles of statutory analysis, nor does it lead to a result which anyone—including the Court in *Diggs*—believes reflects the overall policies contained in the Rules of Evidence, or even a general sense of fair play.

Appellant believes that Congress intended that Rule 609 apply to civil litigants in a manner best calculated to result in a verdict based upon a claim's merits. In civil litigation, with its potential for highly technical issues, reli-

ance upon expert testimony, and concern with providing adequate money compensation, that means giving the trial judge as much latitude as possible in deciding what evidence to include or exclude. Maximum discretion would be obtained by applying the 609(a) balancing test to civil disputes. However, at a minimum, the civil litigant should not be foreclosed from the avenues of relief available under other Rules of Evidence, especially Rule 403.

Nowhere is the unfairness of not permitting a lower Court any discretion more apparent than in a case such as this, where the nineteen-year-old Plaintiff's arm was torn from his body by an allegedly defective machine, and the defense was permitted to attack his credibility by evidence that he once had consensual sexual relations with an underage girl and had been involved in a burglary. These matters have little bearing upon his credibility but, to the defense, weigh heavily upon the issue of his "worthiness" to receive compensation for his injuries. The issue of the victim's "worth" is frequently both the first and last line of defense in a civil case. The Defendant's hope is that this consideration will permeate the jury's deliberations, so that a close case is decided in its favor, or that any verdict rendered to the Plaintiff is less than that which the evidence would otherwise suggest. It is, in fact, the civil equivalent of obtaining a criminal conviction by showing that the Defendant was involved in prior unrelated criminal activity. The Rule grants the trial court authority to prevent such maneuvers in a criminal proceeding, but the Third Circuit believes it permits this same disreputable tactic in a civil case.

This case is important, both to Paul Green and to the general public. When a seriously injured victim does not

receive fair and adequate compensation, he is not the only loser. The public is frequently called upon, throughout the victim's lifetime, to provide the support which the private sector has avoided paying. This is not to say that a defendant in a civil case should be forced to pay without a finding of liability, but that the jury should not be distracted from its consideration of the liability issue by extraneous concerns.

Unless this Court overrules *Diggs*, and harmonizes any ambiguity in Rule 609 with the dictates of common sense, this is precisely what will occur. Congress did not intend for civil lawsuits to be decided other than on their merits.

Paul Green respectfully requests that this Court remand his case for a new trial, with instructions on the proper application of Rule 609 in civil cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that completed copies of the Brief for Petitioner to the U.S. Supreme Court were forwarded this date, August 2, 1988 by First Class Mail.

RESPONDENT'S

BRIEF

No. 87-1816

In The
Supreme Court of the United States
October Term, 1987

PAUL GREEN,

Petitioner,

vs.

BOCK LAUNDRY MACHINE COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether the trial judge committed reversible error by permitting the credibility of Paul Green to be impeached by evidence of his felony convictions for burglary and conspiracy in the products liability action he instituted against the Bock Laundry Machine Company?

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STATEMENT OF THE CASE

On May 22, 1986, Paul Green commenced this action by filing a Complaint. (J.A. 2, 7-10). Green sought compensatory damages from the Bock Laundry Machine Company ("Bock") of Toledo, Ohio, for injuries he sustained as a result of an accident that occurred on June 23, 1984. (J.A. 7, 34). On that date, Green was an inmate at the Cumberland County Prison, Carlisle, Pennsylvania and participated in a work release program as an employee of the Lemoyne Minit Car Wash, Lemoyne, Pennsylvania. (J.A. 7, 30). Green's job required him to dry towels used in the car wash. (J.A. 31-32). The car wash used a water extractor manufactured by Bock to help dry the towels. (J.A. 8, 31, 44-45).

The water extractor was a Model M-100, Serial No. 9289, manufactured in 1965 and shipped directly to the car wash on December 22, 1965. (J.A. 44-45, Plaintiff's Trial Exhibit 1). The M-100 is a device which uses centrifugal force to extract excess water from towels, sheets and other cloth items. Its maximum rated speed is 1,725 r.p.m. The machine was designed so that the power is not activated until the lid is closed and the control arm is moved over it. Once the control arm is in the "on" position, a lug underneath the lid prevents the lid from opening. (Testimony of Thomas Clement, R. 231a-245a).

When the handle is moved to the "off" position, the power is cut, and the primary lid lock is disengaged. The M-100 is equipped with a brake connected by a high tension spring to the control arm. The brake is activated by moving the control arm from the "on" to the "off" position. A properly working brake will stop the basket from spinning within seconds. (*Id.*).

The machine was also designed with a redundant safety interlock system. This mechanical feature prevents the lid from being opened while the basket is spinning. (*Id.*) If an M-100 is working as designed, it is *impossible* for an operator to come in contact with the spinning drum. Before the accident that caused Mr. Green's injuries could happen, it was necessary for two safety devices to be intentionally disconnected. Green's own expert admitted that the machine, as designed, was fail-safe. (Testimony of Stanley R. Kalin, R. 395a).

The extractor remained at the car wash from the time it was shipped from the Bock Factory until the date of the accident. (J.A. 44-45). During this nineteen year period, little or no maintenance was performed on the machine. The testimony revealed only two occasions when repairs were done. An electrical plug was replaced, and an employee, John Emerick, testified that he had taken the machine apart to oil it once. (J.A. 49, 63).

Because of this lack of care, the machine deteriorated. It was described at trial as rusted and corroded. (J.A. 65). As designed and without tampering with the safety systems, the M-100 would become inoperable under these conditions. Subsequent to the time the machine left the possession of Bock, however, the brake mechanism and the mechanical safety interlock were disconnected.[1]

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[1] Under Pennsylvania law, it is a crime to render a safety device ineffective. See 43 P.S. § 25-15. In addition, an employer is charged with the responsibility of maintaining water extractors with proper safeguards. 43 P.S. § 25-2. Except in limited circumstances, however, Pennsylvania's Workmen's Compensation Act prevents the joinder of an employer in a civil action instituted by the employee. 77 P.S. § 481(b).

On June 23, 1984, business at the car wash was slow, and there was no great demand for towels because the owners kept an ample supply on hand. (J.A. 52, 57). Green testified, however, that the machines were in constant use and that he often would be told to hurry and get towels out. (J.A. 35; *see also* J.A. 32). Green testified that, because of the constant need for towels and the fact that the compromised extractor would take several minutes to come to a stop, he had been instructed to place his hand on the center spindle of the drum to slow it down. (J.A. 34). On the day of the accident, Green wrapped a towel around his hand and intentionally placed his arm into the machine "to slow it down." (*Id.*). Apparently the towel became entangled in the drum and his right arm was traumatically amputated at the shoulder.

Bock defended this action by denying that the machine was defective and claiming that Green assumed the risk of any injury he sustained. (J.D. 11). In support of the assumption of risk defense, Bock offered the testimony of the owners of the car wash, Dolores and James Kelly, and three of Green's co-workers, Theresa Wissler, John Emerick and Martin Shetrom.[2] Despite Green's denial of such

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[2] In Footnote 1 of his Brief, Green attacks the trial technique of Bock's counsel by averring that it was obvious that the defense was attempting to divert the jurors attention since "the defense availed itself of the opportunity of impeaching not only Mr. Green" but also two defense witnesses, Martin Shetrom and John Emerick. This argument is flawed for two reasons. First, by the time that Martin Shetrom had testified, Green had already testified, in response to a question by his own counsel, that Shetrom was in prison at the time of the accident (J.A. 33). Second, the evidence was elicited from these witnesses in direct testimony to minimize any impact that might have occurred had counsel for Green raised the issue. Indeed, Plaintiff's counsel utilized this same tactic when he asked for Paul Green's current address in Green's direct testimony. (J.A. 27).

instructions, all five witnesses testified that Paul Green had been instructed prior to the accident never to place his hands into the machine. In light of this conflicting testimony, Paul Green's credibility was directly in issue.

At the time of the trial, Paul Green was twenty-two years old. (J.A. 28). During his short adult life, Green had been convicted of criminal trespass, statutory rape, corruption of the morals of a minor, burglary and conspiracy to commit burglary. All these crimes are punishable by imprisonment in excess of one year.

The grade for criminal trespass depends upon the nature of the crime. *See* 18 Pa. C.S.A. § 3503. The criminal trespass committed by Green clearly was "punishable" by imprisonment in excess of one year because it was for this offense that he was incarcerated at the time of the accident, serving a 5 to 23 month sentence.

Under Pennsylvania law, statutory rape is a felony of the second degree, 18 Pa. C.S.A. § 3122, punishable by imprisonment up to ten years, 18 Pa. C.S.A. § 1103(2). Corruption of the morals of a minor is a first degree misdemeanor, 18 Pa. C.S.A. § 6301, punishable by up to five years imprisonment, 18 Pa. C.S.A. § 1104(1). The burglary and conspiracy convictions were related crimes for which Green was in prison at the time of the trial. Burglary is a felony of the first degree, 18 Pa. C.S.A. § 3502 (c), and since the conspiracy was related to the burglary, it too was a felony of the first degree, 18 Pa. C.S.A. § 905 (a). Felonies of the first degree are punishable by imprisonment of up to 20 years. 18 Pa. C.S.A. § 1103(1).

Prior to trial, Green presented a Motion in Limine requesting that the trial Court exclude his prior criminal

record (J.A. 13-15). Green admitted, however, that the trial Court was bound by *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984) *cert. denied*, 471 U.S. 1078 (1985) (J.A. 13-14, ¶ 4). The trial Court ruled that all the convictions, except the corruption of the morals of a minor charge, could be used for impeachment purposes. At trial the defense questioned Green regarding only the burglary and conspiracy convictions. (J.A. 41).[3]

Following the presentation of the evidence, the jury returned a verdict in favor of Bock. In response to special Interrogatories, the jury found that the machine was not defective. Green raised numerous errors in seeking a new trial, all of which were denied by the trial Court. The trial judge denied Green's Motion for a new trial, specifically finding that the verdict was "fair".

> Although the Plaintiff's accident was extremely serious and carries long-term implications for him, the jury determined as a factual matter that the laundry machine manufactured and sold by the Defendant was not defective at that time. *We believe this was a fair and reasonable conclusion under all of the evidence.* Plaintiff presented and argued his contentions concerning the product in a professional and competent manner, but the weight of the evidence strongly favored the Defendant. *In our opinion, there were no trial errors, but if the trial was not perfect in every respect, Plaintiff suffered no prejudice from any minor flaws.*

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[3] Green asserts that the statutory rape conviction was mentioned in the opening statement of counsel. As no transcript of this statement is available, this assertion must be based upon recollection. It is the distinct recollection of trial counsel for Bock that no such statement was made. Regardless, it was encumbant upon Green to preserve the record, and having failed to do so, Green should not now be permitted to argue from recollection.

September 4, 1987, Memorandum denying Green's Post-Trial Motion at 8, reprinted at 1a-8a of the Petition for Writ of Certiorari (emphasis supplied).

The Third Circuit Court of Appeals affirmed. Green is now before This Honorable Court contending that he did not receive a fair trial because he was impeached by his prior felony convictions.

SUMMARY OF THE ARGUMENT

The primary purpose of the Federal Rules of Evidence is to provide for the uniform treatment of evidentiary issues throughout the Federal system, and Rule 609 is designed with this purpose in mind. The Rule provides for the automatic admissibility of felony and *crimen falsi* convictions for impeachment purposes. To vest discretion in a trial judge to exclude prior convictions would return the Federal Courts to the judicial patchwork of rules which existed prior to the enactment of the Federal Rules of Evidence.

At common law, a felony conviction rendered a witness incompetent to testify at any civil or criminal proceeding. This harsh rule gradually gave way to the practice of allowing a witness to testify, but permitting the opposition to impeach him by evidence of the prior conviction. Although jurisdictions disagreed as to the type of crime which could be used for impeachment purposes, most Courts permitted a witness to be impeached by either a felony or *crimen falsi* conviction. If a crime was a felony or in the nature of *crimen falsi*, it was automatically admissible. The trial judge had no discretion to exclude the evidence.

Despite this widely accepted rule, the United States Court of Appeals for the District of Columbia determined that the statute governing admissibility of prior convictions permitted the trial judge to exclude the evidence if its prejudicial effect outweighed its probative value. *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965). Congress reacted to this decision by amending the statute to mandate the admissibility of prior felony and *crimen falsi* convictions.

Against this backdrop, the Federal Rules of Evidence were drafted and promulgated. The Advisory Committee and Congress both struggled with Rule 609. Regardless, the language of Rule 609 and its legislative history clearly indicate that in civil cases evidence of prior felony and *crimen falsi* convictions is automatically admissible for impeachment purposes.

Furthermore, Rules 102, 403 and 611 do not override the clear intention of Rule 609. Rules 102, 403 and 611 are general rules which cannot control areas specifically addressed by Rule 609. This is consistent with the legislative history of the Federal Rules of Evidence and rules of statutory construction.

Last, even if this Honorable Court were to accept Green's interpretation of Rule 609, a new trial is not warranted. The trial judge specifically determined that Green received a fair trial. Thus, even if this Honorable Court determines that the admission of Green's prior convictions was error, it was harmless error, and this Honorable Court should affirm the decision of the Courts below.

ARGUMENT

A. TRADITIONALLY EVIDENCE OF PRIOR CONVICTIONS WAS FREELY ADMISSIBLE FOR IMPEACHMENT PURPOSES.

In the past the conviction of a person for an infamous crime rendered him incompetent to testify as a witness. *See, e.g.,* Ladd, *Credibility Tests,* 89 U.Pa. L. Rev. 166, 174 (1940). This rule of law owes its origin to English common law and included crimes like treason, other felonies and *crimen falsi. Id., citing* Greenleaf, *Evidence* § 373 (16th Ed. 1899); Starkie, *Evidence* § 118 (1860); Swift, *Evidence* § 52 (1810). This rule found its way into the American common law and persisted into the nineteenth century. Ladd, *Credibility Tests,* 89 U.Pa. L.Rev. at 174.

This absolute bar eventually gave way to the practice of permitting a witness to testify, but allowing him to be impeached by evidence of prior conviction. *See* McCormick, *Handbook on the Law of Evidence* § 43 (3d Ed. 1986). Following removal of the absolute bar to testifying, courts adopted varying approaches to the *types* of crimes that could be used for impeachment purposes. *See generally* Ladd, *Credibility Tests, supra.* Some jurisdictions held that the conviction of any crime—misdemeanor or felony—was admissible. Even a misdemeanor violation of the state's liquor laws could be utilized. *See, e.g. Howard v. State,* 67 Okla. Crim. 445, 94 P.2d 947 (1939). Other jurisdiction would allow only *crimen falsi* convictions to be used. By the mid-twentieth century, the generally accepted rule allowed the impeachment of a witness by evidence of a felony or a *crimen falsi* misdemeanor conviction. Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and*

403, 54 Fordham L. Rev. 1063, 1065, 1068 (1986) [hereinafter cited as "Impeachment in Civil Trials"]. *See also,* Note, *Impeachment By Prior Conviction: Adjusting to Federal Rule of Evidence 609,* 64 Cornell L. Rev. 416, 418 (1979) (evidence of prior convictions "freely admissible").

This approach gave the trial judge no discretion, and thus the automatic admissibility rule was criticized. The Model Code of Evidence contained an alternative approach which vested discretion in the trial judge to exclude evidence of prior conviction if the probative value of the evidence is outweighed by the risk of undue prejudice. *See* Model Code of Evidence, Rules 106, 303(b) (1942). This provision of the Model Code was not widely accepted. *See* Impeachment in Civil Trials, *supra,* at 1068, n. 34.

The drafters of the Federal Rules of Evidence appear to have been well aware of the traditional general rule. The notes of the Advisory Committee regarding the initial draft of Rule 609 indicate that various alternatives were considered (including a discretionary approach), but that the first draft followed the traditional rule. *See Proposed Rules of Evidence* (I), 46 F.R.D. 161, 298-299 (1965).

B. CONGRESS CONSIDERED AND REJECTED THE DISCRETIONARY APPROACH FOR IMPEACHMENT BY PRIOR CONVICTION IN THE DISTRICT OF COLUMBIA.

In *Luck v. United States,* 348 F.2d 763 (D.C. Cir. 1965), the United States Court of Appeals for the District of Columbia Circuit reviewed the statute which then governed the admissibility of prior felony convictions. The statute provided in pertinent part as follows:

> No person shall be incompetent to testify, in either civil or criminal proceedings, by reason of his having been convicted of crime, but such fact may be given in evidence to affect his credit as a witness, either upon the cross-examination of the witness or evidence aliunde; . . .

D.C. Code Ann. § 14-305 (1961) *cited in Luck,* 348 F.2d at 769, n.6.

Charles M. Luck was arrested, tried and convicted of housebreaking and larceny. At trial, the police testified that they responded to a burglar alarm at a coin laundromat. After he was found hiding in an exhaust duct on the roof of the laundromat, Luck allegedly confessed to the crime. Luck testified, however, that he was not at the scene of the crime, but had been arrested several blocks away from the laundromat and then was taken there by police. Luck admitted that he told the police he had committed the crime, but only after he had been coerced by the police to confess.

On appeal Luck contended, *inter alia,* that the trial Court improperly admitted into evidence a prior conviction for grand larceny. The defendant's credibility was clearly in issue as he presented a version of the facts diametrically opposed to the testimony of the prosecution witnesses. In interpreting the statute, the Court stated:

> Section 305 is not written in mandatory terms. It says, in effect, that the conviction 'may', as opposed to 'shall', be admitted; and we think the choice of words in this instance is significant. The trial Court is not required to allow impeachment by prior conviction every time a defendant takes the stand in his own defense. The statute, in our view, leaves room for the operation of a sound judicial discretion to play upon the circumstances as they unfold in a particular case.

Luck, 348 F.2d at 767-68. The Court remanded the matter and instructed the trial judge to use his discretion in determining whether the prior felony convictions should be admitted into evidence.

The *Luck* Court set forth the factors which should be weighed to determine whether evidence of prior convictions should be admitted.

> In exercising discretion in this respect, a number of factors might be relevant, such as the nature of the prior crimes, the length of the criminal record, the age and circumstances of the defendant, and above all, the extent to which it is more important to the search for truth in a particular case for the jury to hear the defendant's story than to know of a prior conviction.

Luck, 348 F.2d at 769.

Opposition to the *Luck* discretionary standard was strong and swift. The Department of Justice, as well as the District of Columbia Bar Association, urged its rejection. *Impeachment in Civil Trials, supra*, p. 9, at 1070, n.8. The concerns of the Justice Department were fully explained in the Department's Report to the Advisory Committee concerning the second draft of Rule 609.

> In reaching its decision to reject the *Luck* rule, Congress found the following reasons persuasive:
>
> (1) The Department of Justice on July 11, 1969, submitted to Congress legislation to overrule the *Luck* case. The Department's major criticisms of the *Luck* rule were set forth by a Department spokesman. Crime in the National Capital, Part 4, Hearings before the Senate Committee on the District of Columbia, 91st Cong., 1st Sess. 1396-97 (1969):

> The obvious reason for permitting impeachment of witnesses by proof of conviction of crimes is to enhance the truth-seeking process of a trial. To arrive at the truth, the fact-finder, be it judge or jury, must assess the credibility of witnesses. It is difficult to conceive of evidence more probative on the issue of a witness' credibility than proof of conviction of a crime which reflects on honesty and veracity or which demonstrates a willingness to engage in conduct which entails substantial injury to and disregard of the rights of other persons or to the public. Preventing impeachment of a criminal defendant eliminates from the fact-finder's consideration this highly probative evidence . . . .
>
> . . . In actual practice, the *Luck* doctrine . . . has proved totally unworkable, principally because no meaningful criteria exist to guide the trial court's exercise of discretion . . . . Since no meaningful criteria do or can exist, appeal is encouraged.
>
> (2) The Bar Association of the District of Columbia supported elimination of the *Luck* rule in the District of Columbia.
>
> (3) The *Luck* rule is inconsistent with the law in almost 90 percent of the States.

Report of the Department of Justice 45-49 (1971) reprinted in *Weinstein's Evidence* at 609-52, n.7 (1982). Confronted with a rule which was contrary to the law in a vast majority of the states and which was strongly opposed by the Bar Association and the Justice Department, Congress changed 14 D.C. Code § 305 to mandate admis-

sion of prior convictions.[4] *See* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, § 133 (July 29, 1970). Clearly Congress did not favor vesting any discretion in the trial judge regarding the admission of prior felony convictions for impeachment purposes.

C. THE LEGISLATIVE HISTORY OF RULE 609 CLEARLY SHOWS THAT CONGRESS INTENDED TO PROVIDE FOR THE AUTOMATIC ADMISSIBILITY OF PRIOR FELONY CONVICTIONS.

In 1961 Chief Justice Earl Warren, at the request of the Judicial Conference of the United States, appointed a Special Committee on Evidence to study the advisability and feasibility of a uniform set of Federal Rules of Evidence.[5] The initial determination to be made by this Committee was whether a set of rules was appropriate. On December 11, 1961, the Committee recommended that a

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[4] The amended statute provides:

> (a) No person is incompetent to testify in either civil or criminal proceedings, by reason of his having been convicted of a crime.
>
> (b) . . . for the purpose of attacking the credibility of a witness, evidence that a witness has been convicted of a criminal offense *shall be admitted* if offered, . . . but only if the criminal offense (A) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (B) involved dishonesty or false statement (regardless of punishment).

D.C. Code Ann. § 14-305.

[5] The early history of the Federal Rules of Evidence is contained in the preface to the first draft of the Advisory Committee. *See Proposed Rules of Evidence* (I), 46 F.R.D. 161, 171-181 (1969).

comprehensive set of Federal Rules of Evidence be promptly promulgated.

After the recommendation was circulated among members of the legal community for comment, the Judicial Conference in 1963 approved the recommendation and called for the appointment of an Advisory Committee on Rules of Evidence ("Advisory Committee"). The Advisory Committee was charged with the responsibility of drafting a uniform set of rules, which was then to be submitted to the United States Supreme Court for adoption.

In March 1969 the Advisory Committee completed a preliminary draft, which was circulated for comment. As contained in the first draft, Rule 609(a) provided as follows:

> (a) **GENERAL RULE.** For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime, (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, or (2) involved dishonesty or false statement regardless of the punishment.

The notes of the Advisory Committee fully explain the rationale for the initial draft. The proposed rule was drafted to adhere "to the traditional practice of allowing the witness-accused to be impeached by evidence of conviction of crime, *like other witnesses.* California Evidence Code § 788 is to the same effect."[6] *Proposed Rules of*

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[6] Although California subsequently adopted a *tuck* approach to the use of prior felony convictions for impeachment, *People*

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Evidence (I), 46 F.R.D. 161, 299 (1969) (emphasis supplied).

Before settling on the preliminary draft, the Advisory Committee considered and rejected five alternatives. Specifically, the Advisory Committee considered:

(1) allowing no impeachment by conviction when the witness is the accused;

(2) allowing only *crimen falsi;*

(3) excluding if the crime is similar;

(4) allowing conviction evidence only if the accused first introduces evidence of character for truthfulness;

(5) *leaving the matter to the discretion of the trial judge.*

Proposed Rules of Evidence (I), 46 F.R.D. 161, 298-99. The notes of the Advisory Committee indicate that the alternative of allowing the matter to remain within the discretion of the trial judge is supported by *Luck v. United States,* 348 F.2d 763 (D.C. Cir. 1965). The Committee rejected the discretionary approach because decisions subsequent to *Luck* have failed to adequately "evolve guides for the exercise of discretion". *Proposed Rules of Evidence* (I), 46 F.R.D. at 299. Clearly the initial recommen-

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v. Beagle, 99 Cal. Rptr. 313, 6 C. 3d 441, 492 P.2d 1 (1971), at the time of the release of the first draft by the Advisory Committee, a California trial court had no discretion to exclude from evidence prior felony convictions when credibility was in issue. *See, e.g. People v. Westek,* 31 Cal. 2d 469, 190 P.2d 9 (1948); *People v. Knighton,* 250 Cal. App. 2d 221, 58 Cal. Rptr. 700; *People v. Avlisi,* 264 Cal. App. 2d 149, 70 Cal. Rptr. 220 (1968).

dation of the Advisory Committee would have allowed a witness to be impeached by felony convictions and any *crimen falsi* crime and would not have permitted the trial judge discretion to exclude such evidence.

Despite the rejection of the discretionary approach in the initial draft of Rule 609, the second effort by the Advisory Committee added a clause which would vest in the trial judge discretion to exclude evidence of prior convictions. The second draft of Rule 609(a) provided:

> *GENERAL RULE.* For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime, except on a plea of *nolo contendere,* is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment, unless (3) *in either case, the judge determines that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.*

Proposed Rules of Evidence (II), 51 F.R.D. 315 (1970) (emphasis supplied). The addition of the third clause to Rule 609(a) was the result of an outpouring of unfavorable reaction to the initial draft. *Weinstein's Evidence,* ¶ 609[01] at 609-50-51 (1982). In response to the criticism, the Advisory Committee, in effect, grafted Federal Rule of Evidence 403 onto Rule 609(a).[7] Indeed, the third clause "is a particularized application of Rule 403

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[7] Apparently the Advisory Committee recognized that Rule 403 *would not* apply to restrict Rule 609. Otherwise, there would be no need to add the virtually identical language to Rule 609.

(a). The provision finds its genesis in *Luck v. United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965)." *Proposed Rules of Evidence* (II), 51 F.R.D. at 393. The second draft was published in March 1971, eight months after Congress had specifically rejected the *Luck* approach for use in the District of Columbia.

Objection to the second published draft was swift. *See Weinstein's Evidence*, ¶ 609[01] at 609-52-53. The Advisory Committee's second version of Rule 609 prompted in part the enactment of The Court Practice Approval Act of 1971. This Act greatly expanded the power of Congress to regulate rules of practice and procedure for the Federal Court system. In introducing the Act, Senator McClellan stated:

> I find it incredible that within less than eight months after the Congress fully considered and decisively rejected the *Luck* rule for the District of Columbia . . . the standing Committee on Rules of Practice and Procedure is now proposing that the *Luck* rule be adopted as the law of the land and applied in every Federal District Court in the country. Apparently, the committee paid no attention to the congressional judgment on this matter.

117 Cong. Rec. 13195 (1971).

The Advisory Committee responded to the criticism expressed by Congress and in the third version of the Rules of Evidence reverted to the language of the initial draft. *Proposed Rules of Evidence* (III), 56 F.R.D. 183, 269-70 (1971). The intent of this final version can best be determined by reviewing the Advisory Committee's Note.

> As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See, McCormick § 43; 2 Wright, Federal Practice and Procedure; Criminal § 416 (1969). *The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of crimen falsi without regard to the grade of the offense.* This is the view accepted by Congress in the 1970 amendment of § 14-305 of the District of Columbia Code, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Luck v. United States*, 121 U.S. App. D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. *Whatever may be the merits of those views, this rule is drafted to accord with the Congressional policy manifested in the 1970 legislation.*

Proposed Rules of Evidence (III), 56 F.R.D. 183, 270 (1971) (emphasis supplied). This final version was adopted by the United States Supreme Court and forwarded to Congress on November 20, 1972.

Upon reaching Congress, Rule 609(a) embarked upon a sea of change. Initially, the House of Representatives considered the issue. The matter was referred to the Special Subcommittee on Reform of Federal Criminal Laws of the House Judiciary Committee, where six days of

hearings were conducted. One of the first individuals to testify was the reporter for the Advisory Committee, Professor Edward W. Cleary. Professor Cleary was promptly presented with the Advisory Committee's treatment of impeachment by prior conviction. He explained that the proposed rule was patterned after the 1970 amendment to the District of Columbia Court Reform Act, which expressly overrode the discretionary approach contained in *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965). Professor Cleary indicated that the Advisory Committee had been unaware of the Congressional Amendment while preparing the second draft, but that once the amendment was brought to the Committee's attention, Rule 609 was again redrafted to reflect the language of the 1970 Amendment.

> We felt that Congress had spoken: that this was an important, significant, thought-out manifestation of congressional policy, and it would not be becoming for us to second-guess it.

Proposed Rules of Evidence, 1973: *Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House of Representative Comm. on the Judiciary*, 93rd Cong., 1st Sess. at 29 (1973). Although Professor Cleary indicated that the Advisory Committee had been bitterly divided and the "problem . . . affords no good answer", it was his personal opinion that the rule of automatic admissibility was "the lesser of two evils". *Id.* at 30.

Despite the clear intent of the Advisory Committee and the prior mandate of Congress, considerable debate and opposition followed. Much of the opposition focused on the "automatic" nature of Rule 609.

> Numerous communications addressed to the Special Subcommittee objected to the inflexibility of Rule 609

> as submitted by the Supreme Court. See, e.g., Statement of James Schaeffer, Chairman, Committee on Federal Evidence and Procedure, Association of Trial Lawyers of America ("This method of character damnation . . . has been soundly condemned by many commentators, and courts and praised by none.") Statement submitted by Center for Law and Social Policy ("only Rule that explicitly contradicts and is inconsistent with Rule 403 . . . The existing Rule 609 does not permit the trial judge any discretion, but commands him to admit evidence he may well believe should not be admitted.") (Special Committee on Federal Practice and Procedure, American Bar Association).

Weinstein's Evidence, at 609-13 (1982). In response to this criticism, the Subcommittee grafted a balancing provision onto Rule 609(a)(1). The rule, formulated by the Subcommittee, provided as follows:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the Court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

H.R. Rep. No. 650, 93rd Cong., 1st Sess. 11 (1973) reprinted in 1974 U.S. Code Cong. & Ad. News 7051, 7084. The difficulty in formulating a workable rule is emphasized by the fact that the House Judiciary Committee was un-

able to accept the draft recommended by its own Subcommittee.

> In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, i.e. crimes involving dishonesty or false statement.

Id.

The version drafted by the Judiciary Committee[8] was referred to the full house and extensive debate followed. The proponents of the Judiciary Committee rule indicated that it was the best solution to preventing conviction of a defendant merely because he is of "bad character". *See* 120 Cong. Rec. 2377 (1974) (remarks of Rep. Dennis). The overriding concern of the representatives was the effect that the rule would have upon the criminally accused. *See, e.g., Impeachment in Civil Trials, supra*, p. 9, at 1071.

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[8] The version sent to the full house by the Judiciary Commjttee simply provided:

> (a) General Rule.—For the purposes of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime involved dishonesty or false statement.

Although the concerns of many Congressmen were directed to criminal cases, there are sufficient remarks to indicate that members of the House were aware that Rule 609 would apply to a civil plaintiff. In moving to amend Rule 609 to reflect the draft proposed by the Advisory Committee, Rep. Hungate stated:

> My amendment would benefit parties on all sides of litigation—the civil plaintiffs and civil defendants, the Government in prosecutions and the criminal defendant.

120 Cong. Rec. 2376 (1974). *See also Id.* at 2377 ("I would point out to you that it does not apply only to a man who is a defendant in a criminal case, but it applies to any witness"); *Id.* at 2379 (remarks of Rep. Wiggins) ("It suggests to me further draftsmanship is necessary to spin off criminal cases from civil cases."); *Id.* at 2381 (Remarks of Rep. Lott) ("I think it is essential to recognize that this is a rule that would have application in both civil and criminal cases."). After considering two amendments[9], the House approved the Federal Rules of Evidence by a vote of 377-13. Rule 609 contained the language prepared by the Judiciary Committee.

Like the House, the Senate was greatly divided regarding the use of prior convictions to impeach. The

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[9] In addition to the amendment offered by Rep. Hungate, Rep. Smith of New York moved to amend Rule 609 to reflect the language suggested by the Special Subcommittee.

matter was referred to the Judiciary Committee which presented yet another draft to the full Senate.[10]

> The committee has adopted a modified version of the House-passed rule. In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence. Therefore, with respect to defendants, the committee agreed with the House limitation that only offenses involving false statement or dishonesty may be used. . . .
>
> With respect to other witnesses, in addition to any prior conviction involving false statement or dishonesty, any other felony may be used to impeach if, and only if, the Court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness.

S. Rep. No. 1277, 93rd Cong., 2d Sess. 15 (1974) reprinted in 1974 U.S. Code Cong. & Ad. News 7075, 7061.

The full Senate, however, rejected the version of Rule 609 recommended by the Judiciary Committee. Sen. McClellan introduced an amendment that would, with minor modification, return Rule 609 to the version promulgated by the Advisory Committee.[11] Again the debate over Rule 609 focused primarily upon its effect on the criminal defendant. *See* 120 Cong. Rec. 37076-80 (1974).

The Senators, like the members of the House, also were aware of the Rule's applicability to civil trials. Sen. Hart's written memorandum, which was inserted into the Congressional Record, provided in pertinent part: "H.R. 5463 will codify evidence law for federal criminal *and civil trials.*" 120 Cong. Rec. 37077 (1974) (emphasis supplied).

At first Sen. McClellan's amendment was rejected. 120 Cong. Rec. 37080 (1974). Upon reconsideration, however, the Senate passed the amendment by a vote of 38-33. *Id.* at 37083.

Because different versions were adopted by the House and Senate, the matter was submitted to a Conference Committee. No record exists of this Committee's debates and deliberations, but the Committee's intent is readily ascertainable from its report.

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[10] The text of Rule 609 recommended by the Senate Judiciary Committee provided:

> (a) General Rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime may be elicited from him or established by public record during cross-examination but only if the crime (1) involved dishonesty or false statement or (2) in the case of witnesses other than the accused, was punishable by death or imprisonment in excess of one year under the law under which he was convicted, but only if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect.

120 Cong. Rec. 37076.

[11] The amendment offered by Sen. McClellan uses, for the first time, the term "shall be admitted." It provided:

> General Rule.—For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which he was convicted or (2) involved dishonesty or false statement, regardless of the punishment.

120 Cong. Rec. 37076 (1974).

With regard to the discretionary standard established by paragraph (1) of Rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect to the defendant. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. *Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.*

Conf. Rep. No. 1597, 93rd Cong., 2d Sess. 9-10 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 7098, 7102-03 (emphasis supplied).

It is clear that Rule 609(a), as drafted, provides for automatic admissibility of misdemeanors involving dishonesty and all felonies to impeach civil plaintiffs. The members of Congress clearly recognized that the Rule would apply to civil trials. To say otherwise would be to hold that Congress was ignorant of Rule 1101(b) which expressly makes the rules applicable to civil and criminal trials.

Rule 609 requires automatic admissibility and leaves no discretion with the trial judge. Congress was fully aware of the risks and benefits of using prior convictions for impeachment. It was aware of the discretionary approach of *Luck v. United States* and its progeny. Nevertheless, Congress chose to reject this thinking. This clear expression of legislative intent should not be ignored.

D. GENERAL RULES 102, 403 AND 611 DO NOT OVERRIDE THE SPECIFIC CONGRESSIONAL MANDATE OF RULE 609.

Green primarily contends that Rule 609 is not so restrictive that it prohibits a trial judge from exercising discretion to exclude evidence of a prior felony conviction offered for impeachment purposes. As a back-up argument, however, Green contends that even if Rule 609 permits no discretion, a trial judge may exclude a prior conviction under Rules 102, 403 and 611. This rationale is flawed for two reasons. First, basic rules of statutory construction provide that specific terms of a legislative enactment control over general terms. Second, Green's theory ignores the clear intent of the drafters of the Federal Rules of Evidence.

Rule 609 is designed to deal with a specific evidentiary issue which arises in both civil and criminal trials—impeachment by prior conviction. By contrast, Rules 102, 403 and 611 are designed to deal with situations which are not otherwise addressed in the Federal Rules of Evidence. Basic principles of statutory construction require that specific portions of a statute are to control over more general sections. *Bulova Watch Company, Inc. v. United States,* 365 U.S. 753 (1961); *Fourco Glass Company v. Transmirra Products Corp.,* 353 U.S. 222 (1957); *Clifford F. MacEvoy Co. v. United States,* 322 U.S. 102 (1944); *D. Ginsberg & Sons, Inc. v. Popkin,* 285 U.S. 204 (1932).

In *D. Ginsberg & Sons, Inc. v. Popkin,* a creditor of a bankrupt corporation obtained a writ of *ne exeat* against

the president of the corporation, who moved to vacate the writ pursuant to §§ 9(a) and 9(b) of the Bankruptcy Code, which generally exempted bankrupts from arrest. The District Court denied the motion to vacate, but the Second Circuit Court of Appeals reversed.

On certiorari, this Honorable Court reviewed the relationship between sections 2, 9(a) and 9(b) of the Bankruptcy Code. 11 U.S.C. §§ 11, 27(a), 27(b) (repealed). In seeking the writ of *ne exeat*, the creditor relied upon the general equitable powers of the court, to issue orders regarding officers of a corporation. Section 9(a) of the Bankruptcy Code, however, exempted a bankrupt from arrest except in instances of contempt. Although Section 9(b) may have provided for the means to obtain the writ, its prerequisites had not been satisfied. In affirming, the Court stated:

> In view of the general exemption of bankrupts from arrest under Section 9(a) and the carefully guarded exception made by Section 9(b) as to those about to leave the district to avoid examination, there is no support for petitioner's contention that the general language of Section 2(15) is a limitation upon Section 9(b) or grants additional authority in respect of arrests of bankrupts. General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. Specific terms prevail over the general in the same or another statute which otherwise might be controlling.

Ginsberg, 285 U.S. at 207 (citations omitted).

Furthermore, to permit Rules 102, 403 and 611 to override the specific nature of Rule 609 would ignore the intent of the Advisory Committee which drafted the Federal Rules of Evidence. The Notes of the Advisory Committee to Rule 403 state:

> The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule which is designed as a guide for *the handling of situations for which no specific rules have been formulated.*

Proposed Rules of Evidence (III), 56 F.R.D. 183, 218 (1971) (emphasis supplied).

Finally, to accept the proposition of Green would render meaningless all other specific guidelines contained in the Federal Rules of Evidence. If a trial judge has broad discretion to exclude evidence otherwise admissible under Rule 609, then it logically follows that the trial judge has the power to override other specific provisions of the Federal Rules of Evidence. Under Green's hypothesis, a trial judge could make a determination under Rule 102 that "to secure fairness", it is necessary to admit evidence of liability insurance prohibited by Rule 411 or evidence of a subsequent remedial measure prohibited by Rule 407. Similarly, the trial court could refuse to permit an expert to testify regarding the ultimate issue to be decided by the jury, which is clearly permitted by Rule 704.

The Federal Rules of Evidence were enacted to provide for the uniform treatment of evidenitary issues throughout the federal system. To vest in trial judges the discretion to override the Rules of Evidence would

signal a return to the judicial patchwork that existed prior to the enactment of the Rules. Clearly this was not the intent of the drafters and is not the purpose of the Federal Rules of Evidence.

E. THE WELL-REASONED JUDICIAL TREATMENT OF IMPEACHMENT BY ADMISSION OF PRIOR FELONY CONVICTIONS AFTER ENACTMENT OF THE FEDERAL RULES OF EVIDENCE FAVORS AUTOMATIC ADMISSIBILITY.

Petitioner contends that the "overwhelming weight of judicial authority" allows the trial judge to exercise discretion in the admission of prior felony convictions for impeachment purposes, but this position is not supported by the literature or cases in which the issue has been discussed. At least one commentator has indicated that the balancing provision of Rule 609(a)(1) clearly is inapplicable to civil plaintiffs, but whether Rule 403 nevertheless applies is still an "open question". *Weinstein's Evidence*, at ¶ 609 [06] (1982). *See also Impeachment in Civil Trials*, *supra*, p. 9, at 1064 (citing numerous cases on both sides of the issue).

The fallacy of Green's premise can best be recognized by reviewing the decision of the Seventh Circuit in *Campbell v. Greer*, 831, F.2d 700 (7th Cir. 1987).[12] In *Campbell* a prison inmate instituted a civil rights action against officials and guards of the institution at which he was

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[12] At Page 30 of his Brief, Green cites *Lenard v. Argento*, 699 F.2d 874 (7th Cir. 1983) for the proposition that the balancing provision of Rule 609(a)(1) applies to all civil parties and witnesses. The Court in *Campbell* expressly disapproves of utilizing *Lenard* for that proposition. *See Campbell*, 831 F.2d at 704.

incarcerated. Rudolph Campbell contended that the injuries he sustained in a stabbing inflicted by a fellow inmate were caused by the failure of the prison guards to protect him from the attack. Specifically, Campbell alleged that he had advised the officials of a potential attack but that they failed to follow proper safety procedures in protecting him. A jury returned a verdict in favor of the prison officials. In seeking a new trial, Campbell argued, *inter alia*, that defense counsel should not have been permitted to disclose that Campbell had been convicted of rape.

In affirming the decision of the magistrate regarding the admission of the rape conviction, Judge Posner thoroughly reviewed the legislative history of Rules 609 and 403 and decisions interpreting the rules. After concluding that the balancing provision of Rule 609(a)(1) applies only to criminal defendants, Judge Posner noted that several courts have taken contrary positions.

> Some cases, illustrated by *Petty v. Ideco*, 761 F.2d 1146, 1152 (5th Cir. 1985), disagree with this conclusion and hold that the balancing test is applicable to any witness, but we do not find these cases persuasive in light of the language and legislative history of Rule 609(a).

Campbell v. Greer, 831 F.2d at 704. The primary flaw with decisions like *Petty v. Ideco*, *supra*, is that they are "conclusions" without any rationale. The decision in *Petty* is based on a prior Fifth Circuit opinion in *Howard v. Gonzales*, 658 F.2d 352 (5th Cir. 1981). Neither the opinion in *Petty* nor in *Howard* mentions, let alone reviews, the legislative history. These decisions are not persuasive when compared to the careful thought process engaged in

by the Seventh Circuit in *Campbell v. Greer* and by the Third Circuit in *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984) *cert. denied*, 471 U.S. 1078 (1985).

Indeed, the Seventh Circuit criticized its own prior opinion of *Lenard v. Argento*, 699 F.2d 874 (7th Cir. 1983), as follows:

> And while it is true that in *Lenard v. Argento* . . . we upheld the exclusion of a conviction that had been tendered to impeach a witness in a civil case, no one, so far as it appears from the opinion, had ever raised a question about the applicability of the balancing test of Rule 609(a). *There was no holding that it was applicable, only an assumption based upon the failure of any party to put the point in issue.*

Campbell, 831 F.2d at 704 (emphasis supplied). The remaining cases cited by Green, *Murr v. Stinson*, 752 F.2d 233 (6th Cir. 1985) and *Calhoun v. Baylor*, 646 F.2d 1158 (6th Cir. 1981), fall into the same trap as the *Lenard v. Argento* opinion: an assumption that the balancing provision of Rule 609(a)(1) applies in the civil context. Neither opinion from the Sixth Circuit gives a rationale for applying the balancing provision. Rather, the provision is simply applied. This conclusory reasoning should be rejected.

The court in *Campbell v. Greer* also rejected the argument that, regardless of the applicability of the balancing provision of Rule 609(a)(1), Rule 403 may still be employed to exclude evidence of prior crimes.

> That rule [403] is a catchall. It was not meant to overlap, supplant, or contradict the policy premises of more specific rules such as Rule 609. The Advisory Committee's Note to Rule 403 says it "is designed as a guide for the handling of situations for which no specific rules have been formulated." Rule 609(a) is a specific rule governing the admissibility of convictions to impeach a witness's testimony.

Campbell, 831 F.2d at 705. This rationale is consistent with the purpose of Rule 403 and the general rules of statutory construction.

Perhaps the most compelling reason for rejecting Green's use of Rule 403 is that if it overrides Rule 609(a)(1), it overrides Rule 609(a)(2) and every other specific rule contained in the Federal Rules of Evidence. *Every* court that has considered the issue has refused to apply Rule 403 to convictions admissible under Rule 609(a)(2). *See, e.g. United States v. Kiendra*, 663 F.2d 349 (1st Cir. 1981); *United States v. Wong*, 703 F.2d 65 (3d Cir.), *cert. denied*, 464 U.S. 842 (1983); *United States v. Lipscomb*, 702 F.2d 1049 (D.C. Cir. 1983); *United States v. Toney*, 615 F.2d 277 (5th Cir.), *cert. denied*, 449 U.S. 985 (1980); *United States v. Kueker*, 740 F.2d 496 (7th Cir. 1984); *United States v. Leyva*, 659 F.2d 118 (9th Cir. 1981), *cert. denied*, 454 U.S. 1156 (1982).

As Green indicates, several courts have applied Rule 403 to exclude evidence otherwise admissible under Rule 609(a)(1). *See Czajka v. Hickman*, 703 F.2d 317 (8th Cir. 1983); *Shows v. M/V Red Eagle*, 695 F.2d 114 (5th Cir. 1983); *Diaz v. Cianci*, 737 F.2d 138 (1st Cir. 1984); *Radtke v. Cessna Aircraft Company*, 707 F.2d 999 (8th Cir. 1983).

As Judge Posner has stated, this line of cases owes its genesis to *Shows v. M/V Red Eagle, supra*. The decision in *Shows*, however, is suspect for several reasons.

First, it does not discuss the Advisory Committee note to Rule 403 or the general rules of statutory construction.

Second, the *Shows* decision is premised upon the court's prior decision in *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978). *Rozier* held that Rule 403 could be utilized to exclude evidence otherwise admissible under the hearsay rules, however, one crucial distinction exists between Rule 609(a) and the hearsay rules. Evidence of prior felony convictions *"shall"* be admitted under Rule 609(a). Conversely, Rules 802 and 803 indicate classes of evidence that "are not excluded" under the hearsay rule. "Evidence may be inadmissible for more than one reason." *Campbell*, 831 F.2d at 706.

Third, the decision of the Fifth Circuit in *Shows* is inconsistent with its own opinion refusing to apply Rule 403 to override Rule 609(a)(2). *See United States v. Toney, supra. See also, Diaz v. Cianci, supra; United States v. Kiendra, supra.* It is a quantum leap in logic to hold that Rule 403 is a "rule of exclusion that cuts across the rule of evidence" to override Rule 609(a)(1), *Shows, supra*, 695 F.2d at 114, but then to *refuse* to apply it to Rule 609(a)(2). *Compare United States v. Toney, supra.*

To accept Green's argument would be to emasculate the Federal Rules of Evidence. The Rules were designed to provide uniform treatment throughout the Federal system. Prior to the enactment of the Rules, evidentiary rulings often created divisions between and within the Circuits. An acceptance of Green's argument would reweave this judicial patchwork.

Under Rule 609(a)(2), *crimen falsi* convictions are automatically admissible to impeach the criminal defendant, while other felonies are subject to the balancing provision of Rule 609(a)(1). In determining what crimes are *crimen falsi*, the Circuits often disagree. Robbery is *crimen falsi* in the Eighth Circuit but not in the Ninth. *Compare, United States v. Halbert*, 668 F.2d 489 (8th Cir.), *cert. denied*, 456 U.S. 934 (1982) *with United States v. Hendershot*, 614 F.2d 648 (9th Cir. 1980). Larceny is *crimen falsi* in the First Circuit but not within the District of Columbia Circuit. *Compare, United States v. Del Toro Soto*, 676 F.2d 13 (1st Cir. 1982) *with United States v. Wearwell*, 595 F.2d 771 (D.C. Cir. 1978).

If the various Circuits cannot agree on which crimes constitute *crimen falsi*, they surely will provide varying opinions regarding the "discretionary" approach to the use of prior felony convictions to impeach civil plaintiffs. A decision supporting such a discretionary approach will encourage as much, if not more, forum shopping than Green fears will arise as a result of the automatic admissibility rule. In today's global economy, many districts often are available to the civil plaintiff. A plaintiff (like Charles Diggs, who had been convicted of bank robbery, attempted prison escape, criminal conspiracy and twice of murder, *Diggs v. Lyons*, 741 F.2d 577, 578 (3d Cir. 1984) *cert. denied*, 471 U.S. 1078 (1985), will choose a Circuit or even a district which is more predisposed to excluding criminal convictions.

In the typical civil trial, evidence and argument is presented to the jury in machine gun fashion. Jurors are expected to digest this information (often without the aid of notes), listen to the charge of the Court and return a

fair verdict. The task is compounded by conflicting evidence that requires the jurors to measure the credibility of witnesses, but this is an important function of the jury. Congress has clearly stated that in assessing credibility, the trier of fact must have "as much relevant evidence on the issue of credibility as possible." Perhaps this can best be summarized as follows:

> The object of a trial is not solely to surround an accused with legal safeguards *but also to discover the truth.* What a person is, often determines whether he should be believed. . . . No sufficient reason appears why the jury should not be informed what sort of person is asking them to take his word. *In transactions of everyday life, this is probably the first thing they would wish to know.*

State v. Duke, 100 N.H. 292, 293, 123 A.2d 745, 746 (1956) (emphasis supplied).

Congress has clearly condoned the use of prior convictions for impeachment purposes, and it is respectfully suggested that this Honorable Court should defer to the Congressional mandate and affirm the decisions of the Courts below.

F. EVEN IF THIS COURT DETERMINES THAT A TRIAL JUDGE HAS DISCRETION TO EXCLUDE EVIDENCE OF PRIOR FELONY CONVICTIONS OFFERED FOR IMPEACHMENT PURPOSES, THE ADMISSION OF PAUL GREEN'S PRIOR CONVICTIONS WAS HARMLESS ERROR.

The instant case was a complex trial primarily concerned with whether the machine in question was safe for its intended use. Prior to the trial, the parties stipulated that the case would be bifurcated and that the jury first

would determine the issue of liability. At the close of the evidence, the Court charged the jury and instructed them to respond to special Interrogatories. Initially, the jury was required to determine whether the machine was defective when it left the Defendant's control. If the jury answered affirmatively, they were then required to state the nature of the defect, i.e. a failure to warn or a design defect. If the jury answered yes to both questions 1 and 2, they were then required to determine whether the defect was a substantial factor in causing Green's injury. Only if the jury answered yes to all three of these questions, were they required to answer question 4, which concerned the defense of assumption of risk. (J.A. 116-117). After deliberating, the jury answered question 1 in the negative. (J.A. 119). Consequently, a verdict was entered in favor of Bock and against Green.

The only issue in which Green's credibility was relevant was that of the assumption of risk defense. The jury never reached this issue, and therefore the admission of Green's prior criminal record could not have substantially affected the verdict.

Federal Rule of Evidence 103 has codified the common law rule of harmless error. (Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.) In the criminal context, to decide whether the admission of evidence constitutes harmless error, the Court must determine beyond a reasonable doubt that the objectionable evidence did not contribute to the conviction. *See Fahy v. Connecticut,* 375 U.S. 85 (1963). In a civil case, the question is whether the admission of evidence might have contributed to denying the plaintiff a verdict. *Id.* Many

errors, even in criminal cases, are harmless. Indeed, this Court has determined that the presentation of evidence which violates a constitutional right of a criminal defendant may be rendered harmless. *United States v. Hastings*, 461 U.S. 499 (1983).

In the instant case, the trial Court instructed the jury that they should consider the evidence of prior convictions only in assessing Paul Green's credibility.

> One of the matters which the law in Federal Court permits to be introduced is a person's past criminal record, whether he be a party or just a witness, and the only purpose of that is not to prejudice him certainly, it is only to give you all of the information that you are entitled to have in determining whether or not that witness is credible, and you may consider the evidence when you evaluate Mr. Green's testimony. Certainly it does not mean that one who has been convicted of a crime is not a truthful witness, but it's just something that you may consider along with everything else in judging Mr. Green's credibility.

(J.A. 111). Further, the trial judge specifically informed the jury that the prior convictions were not to prejudice Mr. Green's case. Because the only issue on which Mr. Green's credibility was relevant was the assumption of risk defense and that issue was never reached by the jury, any admission of Paul Green's prior convictions was harmless error.

———o———

CONCLUSION

As designed and drafted, Rule 609 provides in civil cases for the automatic admissibility of evidence of a prior felony or *crimen falsi* conviction to impeach a witness or party. Commentators and Courts have disagreed as to the wisdom of this practice. Congress considered the criticism and alternatives. It rejected various approaches as either impractical or contrary to the efforts of the judicial system to ascertain the truth. Congress has spoken clearly. It is not for the Courts to rewrite the Federal Rules of Evidence.

To vest discretion in the trial judge to exclude evidence of prior convictions would render the Rules of Evidence a nullity. The Rules were promulgated to provide uniform treatment of evidence issues in the federal judiciary. If discretion is allowed, however, the Courts would return to the judicial patchwork that existed prior to the enactment of the Federal Rules of Evidence.

In the instant case, the trial Court properly admitted the prior convictions of Paul Green. The Bock Laundry Machine Company respectfully requests this Honorable Court to affirm the decisions of the lower Courts.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

NO. 87-1816

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1987

PAUL GREEN,
Petitioner

v.

BOCK LAUNDRY MACHINE COMPANY,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENT BY THE COMMONWEALTH OF PENNSYLVANIA AND OTHER AMICI APPEARING ON INSIDE COVER

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QUESTION PRESENTED

Whether admission of a plaintiff's felony convictions in a civil case is required by Rule 609 of the Federal Rules of Evidence?

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INTEREST OF THE AMICI

The amici states along with their officials and employees often find themselves defendants in civil actions brought in Federal Court. Civil actions brought by convicted felons alone account for thousands of cases handled by the courts each year. Many times the fact-finder in these cases is required to assess the credibility of the witnesses -- whether they be parties or non-parties. In furtherance of their responsibility to represent zealously and professionally the interests of the states and their officials, counsel often must challenge the credibility of these witnesses.

This case presents the Court with the opportunity to resolve a conflict among the Circuits over the proper interpretation of a Federal Rule

of Evidence that permits counsel to challenge the credibility of a witness by use of his or her felony convictions. By adhering to the language of Rule 609 as well as the intent of Congress in adopting the rule, the Court of Appeals for the Third Circuit has followed the teachings of this Court to defer to Congress in making the necessary policy choices in such matters. Adherence to the language of the rule permits amici to place before the factfinder in a civil case relevant evidence on the issue of credibility -- a choice which assists the factfinder in arriving at the truth and one which Congress obviously sought to promote.

For these reasons, amici join with respondent in urging the Court to affirm the decision of the court below.

ARGUMENT

ADMISSION OF A PLAINTIFF'S FELONY CONVICTIONS IN A CIVIL CASE IS REQUIRED BY RULE 609 OF THE FEDERAL RULES OF EVIDENCE.

In his brief, petitioner repeatedly characterizes the application of Rule 609(a) to witnesses in civil actions as "ambiguous" or "bizarre" and one which frustrates a plaintiff in recovering damages for an alleged wrong. Notwithstanding petitioner's frustration with the operation of the Rule to his case, the fact remains that, as finally adopted by the Congress, the Rule not only permits but requires the admission of a witness' felony convictions if elicited to impeach his credibility.[1]

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[1]At the outset we note petitioner does not seriously dispute that credibility was an issue for the jury. He

(FOOTNOTE CONTINUED ON NEXT PAGE)

As the Court often has repeated, the starting point in any case involving construction of a statute is the language itself. Southeastern Community College v. Davis, 442 U.S. 397, 405 (1979); Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978). Whatever may be said about the "tortuous" legislative history of Rule 609 (Br. for Petitioner at 17), the fact remains that the language as adopted provides that the conviction "shall be admitted" and

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(FOOTNOTE CONTINUED)

concedes that the case contained at least a "limited" credibility issue with regard to a theory of liability and a defense. (Br. p. 9). In any event, we assume that credibility was an appropriate factor in this case as tried.

that the balancing test for the admission is applicable only with respect to the "prejudicial effect to the defendant." F.R.E. 609(a), 28 U.S.C. Congress certainly knows how to adopt language to express its intent; the fact that it chose to require a balancing test only where there may be possible prejudice to a defendant represents a choice it is entitled to make. The language of the Rule itself thus supports the admission of felony convictions against a witness in a civil case without the need for a balancing test.

But even if the clear language of the Rule were not sufficient, its legislative history supports this construction. As adopted, Rule 609(a) is a compromise proposed by a Conference

Committee. In their report, the House conferees stated:

> With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined the the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect to the defendant. The danger of prejudice to a witness other than the defendant (such as injury to the witness's reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

(emphasis in original). The version which finally was enacted by the Congress thus made all felony convictions of a witness admissible, and it was the defendant in a criminal case about whom the conferees were concerned when they added the balancing test. See generally Diggs v. Lyons, 741 F.2d 577, 579-80 (3d Cir. 1984), cert. denied, 471 U.S. 1078 (1985).

Petitioner does not find serious fault with the Diggs court's recitation of the legislative history of Rule 609(a). Instead, he simply disagrees with the Rule's application to witnesses in a civil case and assumes that Congress could not have intended this result. The short answer, of course, is that Congress is in the best position to make the policy choices. The "danger of prejudice to a witness

other than the defendant (such as injury to the witness's reputation in his community) was considered and rejected by the Conference [Committee] as an element to be weighed in determining admissibility." H.Rep. 93-1597; 120 Cong. Rec. 40070, 40897. Instead, it "was the judgment of the Conference that the danger of prejudice to a non-defendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible." Ibid. In furtherance of the goal of providing as much evidence on credibility as possible, Congress has directed that felony convictions of a witness are admissible. Such a clear statement of policy obviously cannot be characterized

as mere "snippets of legislative history." Diggs, supra, 741 F.2d at 583 (Gibbons, J., dissenting).[2]

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[2]Petitioner suggests that the law in Pennsylvania is "very restrictive" on the admission of felony convictions (Br. p. 27), citing Commonwealth v. Bighum, 452 Pa. 554, 307 A.2d 255 (1973). Recently, however, the Pennsylvania Supreme Court re-evaluated Bighum and adopted the approach of F.R.E. 609 -- at least as to convictions involving dishonesty or false statement -- concluding that it provides more certainty to litigants and trial courts. See Commonwealth v. Randall, 515 Pa. 410, 415, 529 A.2d 1326, 1328 (1987). Thus, to the extent petitioner's suggestion is even relevant to a discussion of a federal rule applicable in a diversity case, it is not accurate to say that prior convictions are admissible in Pennsylvania "only if the probative value of the evidence outweighs its prejudicial effect." (Br. at 27). Randall, supra, 515 Pa. at 415, 528 A.2d at 1328-29.

We recognize that some Courts of Appeals have undertaken a balancing approach apparently in a desire to ameliorate what they perceive to be the inequitable effect of Rule 609(a) in civil cases. None of the decisions relied upon by petitioner, however (Br. at 30), engages in a discussion of the legislative history of the Rule much less explain how the decisions comport with the policy choices adopted by the Conference Committee and approved by both Houses of Congress. Moreover, the decisions do not squarely address the narrow question presented since they affirm decisions of trial courts finding that the value of the convictions actually outweighed a claim of prejudice to the witness.

Finally, petitioner argues that, whatever may be said about Rule 609, the use of felony convictions is subject to Rule 403's exclusion of evidence where "its probative value is substantially outweighed by the danger of unfair prejudice...." F.R.E. 403, 28 U.S.C. Relying upon such decisions as Czajka v. Hickman, 703 F.2d 317 (8th Cir. 1983), petitioner asserts that, by virtue of Rule 403, Rule 609(a) cannot be the "sole criterion" for admission of felony convictions.[3] (Br. at 31.)

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[3]The decisions other than Czajka relied upon by petitioner do not assist the analysis. For example, Diaz v. Cianci, 737 F.2d 138 (1st Cir. 1984) involved not a felony conviction but an adjudication in a juvenile proceeding, and Radtke v. Cessna Aircraft Company, 707 F.2d 999 (8th Cir. 1983) simply relied upon the earlier Czajka decision from the same Circuit.

This argument again overlooks important legislative history. Rule 403 was "not designed to override more specific rules; rather it was 'designed as a guide for the handling of situations for which no specific rules have been formulated.'" Diggs v. Lyons, 741 F.2d at 581; United States v. Kiendra, 663 F.2d 349, 354 (1st Cir. 1981); quoting Advisory Committee Note to Rule 403. Obviously, Rule 609 is such a "specific rule." As the Diggs Court stated, the Rule "was the product of extensive Congressional attention and considerable legislative compromise...." 741 F.2d at 581. Accordingly, the statement in Czajka that Rule 403 "cuts across the rules of evidence" and must be applied

to limit other more specific rules ignores clear Congressional intent.

* * *

The clear language of Rule 609(a) coupled with its legislative history require that the interpretation given to it by the Court of Appeals for the Third Circuit be endorsed by this Court. The Court should reject petitioner's invitation to read the intent of Congress out of the Rule.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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Date: September 6, 1988

REPLY BRIEF

(8)

No. 87-1816

In the Supreme Court of the United States

Term, 198

PAUL GREEN,

Petitioner

vs.

BOCK LAUNDRY MACHINE COMPANY,

Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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ARGUMENT

A. Those Courts Which Eliminate Judicial Discretion in Interpreting Rule 609(a) Reach that Result by Assuming Part of What They Seek To Prove

In its Brief, Respondent Bock Laundry Machine Company advances the recent case of *Campbell v. Greer*, 831 F.2d 700 (7th Cir. 1987) as an example of well-reasoned authority on the issue of Rule 609's interpretation. Two members of the *Campbell* panel decided, as did the panel in *Diggs v. Lyons*, 741 F.2d 577 (3d Cir. 1984) that Rule 609(a)(1) mandates the admission of impeaching felonies against a civil party or witness.

It is important to make several preliminary observations about *Campbell*. First, this decision shows that not only is there a split of authority between the Circuits on the proper interpretation of Rule 609(a)(1), but a division within a Circuit as well. *See, Lenard v. Argento*, 699 F.2d 874, 894-895 (7th Cir. 1983). If anything, this fact highlights the ambiguous nature of Rule 609(a)(1), as written, as well as the difficulty of finding positive evidence of Congressional intent in the relevant legislative history. Second, as the concurring Judge in *Campbell* points out, the Court's decision need not rest upon its analysis of Rule 609, which can be characterized as dicta.

Regardless, it appears that the Court's reasoning in *Campbell* arrives at the heart of the difficulty in correctly interpreting Rule 609. It is Petitioner Paul Green's position

that the *Campbell* Court arrives at the wrong result because it, like the *Diggs* Court, actually assumes part of what it seeks to prove. After discussing portions of the legislative record, the Court states:

> We do not pretend that these arguments are conclusive; we point out that one Congressman thought that what is now Rule 403 would permit the exclusion of a previous conviction in exceptional cases, though apparently he favored a version of Rule 609(a) that would not have given even the criminal defendant the benefit of a balancing test. See 120 Cong.Rec. 2381 (1974). For us the clinching argument against the applicability of Rule 403 is the unacceptable implication of the argument, which is that a district judge or magistrate could exclude even convictions for crimes of dishonesty or false statement if convinced that the probative value of such evidence in the circumstances of the case was substantially outweighed by its prejudicial effect. For remember that the balancing test of Rule 403 is not limited to any particular class of evidence. If it overrides the express statement in Rule 609(a)(1) that evidence of prior convictions shall be admissible unless prejudice *to the defendant* outweighs the probative value of the evidence, then it overrides the express statement in Rule 609(a)(2) that evidence of prior convictions involving dishonesty or false statement is admissible regardless of prejudice to the defendant or anyone else. Yet Congress plainly decided that such evidence should be admissible regardless of its prejudicial effect, even against a criminal defendant; and if it is admissible against a person facing the loss of his liberty and the humiliation of a criminal conviction it must also be admissible against a civil plaintiff or other witness in a civil case.

Campbell v. Greer, supra, 831 F.2d at pp. 705-706. (Emphasis in original.)

The central mistake made in both *Diggs* and *Campbell, supra,* is the conclusion that Rule 609(a)(1) is a specific pronouncement of Congress' attitude towards the admissibility of felonies against a civil party. Both Courts assumed that because the Federal Rules of Evidence apply in both civil and criminal forums, Congress must have considered and decided the applicability of a Rule dealing with a particular subject matter—such as the introduction of evidence of impeaching felonies—to civil litigants. Yet, it is this very assumption that reference to the language of the Rule itself, to its legislative history, and to common sense so readily undermines.

Because Congress never considered the efficacy of freely admitting evidence of felonies against any civil party or witness, the United States Supreme Court may apply the Rules of Statutory Construction to 609(a)(1), and conclude that the civil litigant should be afforded the same protections as the criminal defendant. It is precisely because Congress wrote Rule 609(a)(1) specifically for the conduct of criminal cases, with no regard for its operation in civil litigation, that a vacuum exists into which Rule 403 may rush.

The argument that applying Rule 403 to 609(a)(1) would permit its application to 609(a)(2), or to a variety of other rules which deal quite specifically with a narrow subject matter, is a victim of the same assumption. Rule 403 may not be applicable to 609(a)(2) simply because the latter may reflect Congress' thinking on the admissibility of

crimen falsi evidence on either the criminal or civil side—something which 609(a)(1) does not do. The concurring Judge in *Campbell* recognized this argument:

> He then goes on to conclude that, since Congress dealt specifically in Rule 609(a) with the question of the admissibility of prior convictions, Rule 403 which permits the exclusion of any relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury, . . .' is inapplicable to prior conviction evidence in civil, as well as in criminal, cases. If Rule 609(a) is read, through judicial patchwork, to apply only to criminal cases, I find it illogical, as well as unnecessary, to conclude that Rule 403 is never applicable to prior conviction evidence in civil cases. That conclusion is inconsistent with what some members of Congress clearly intended as Judge Posner's opinion points out, as well as a number of prior decisions. Shows v. M/V Red Eagle, 695 F.2d 114, 118-119 (5th Cir. 1983); Czajka v. Hickman, 703 F.2d 317, 318 (8th Cir. 1983).

Campbell v. Greer, supra, 831 F.2d at p. 708 (7th Cir. 1987).

It must be noted that whether 609(a)(2) is so comprehensive, is not presently before the Court and need not be decided. Still, it must be remembered that the civil litigant is always vulnerable because he can be forced to testify at trial, thus putting his credibility into issue. Contrastingly, the criminal defendant can decline to take the stand. Thus, even *crimen falsi* offenses are not always admissible against the criminal defendant.

As a second argument, the *Campbell* Court opines that even though Congress "was not concerned with the prejudicial effects of [impeaching felonies] in a civil proceeding" it "did not in Rule 403 seek to undo the common law rule that would permit such use against any witness in a civil or criminal proceeding." *See, Campbell*, 831 F.2d at 706. Yet, the Court immediately admits that at the time the Federal Rules were enacted, the trial courts were generally applying a procedure similar to that followed in *Luck v. United States*, 348 F.2d 763 (D.C. Cir. 1965). *See, Campbell*, 831 F.2d at 706, *citing* Note, *Impeachment by Prior Conviction: Adjusting to Federal Rule of Evidence 609*, 64 Cornell L.Rev. 416, 418 and footnote 20 (1979); *see also*, Note, *Prior Convictions Offered for Impeachment in Civil Trials: The Interaction of Federal Rules of Evidence 609(a) and 403*, 54 Fordham L.Rev. at 1069 (1986).

To the extent that the prior practice is relevant[1], it seems clear that the Federal Courts had carefully preserved the Trial Judge's ability to avoid undue prejudice. *See also*, Appellant's Brief on the Merits, pp. 19-21. Thus, any argument that providing the Trial Court with discretion to avoid injustice is in derogation of the common law, is not founded upon an accurate picture of the prior practice.

---

[1] The prior practice was also discussed in connection with Appellant's argument that a Federal Court at one time looked to the law of the state in which it was located for guidance. *See*, Appellant's Brief on the Merits, p. 27. Appellant specifically asserted that Pennsylvania was very restrictive in its approach towards admitting evidence of a party's criminal record for impeachment purposes, *citing Commonwealth v. Bighum, Appellant*, 452 Pa. 554, 307 A.2d 255 (1973).

The amici point out that *Bighum* was modified in *Commonwealth v. Randall*, 515 Pa. 410, 528 A.2d 1326 (1987). However, the modification affects only the admissibility of *crimen falsi* offenses; *Bighum* remains the law in Pennsylvania in all other respects.

Argument

B. The Introduction of Paul Green's Criminal Record Was Not Harmless Error

Two additional points need to be addressed. In its Brief, Bock argues that any error committed in admitting Green's record into evidence is harmless because the Court, in deciding Paul Green's Motion for a New Trial, asserted that the trial was fair, even if not perfect in all respects. This argument ignores the fact that the Trial Court was bound by the Third Circuit's decision in *Diggs* and could not consider whether admission of Green's felonies was prejudicial. The Trial Court, in its Opinion, addressed only Paul Green's other assignments of error.

Bock also argues that admission of these felonies was harmless error because Paul Green's credibility was not at issue except with regard to Bock's defense that Green assumed the risk of his injury, and the jury never reached that question. In so arguing, Bock has simply ignored Appellant's contention that credibility was also at issue with respect to one theory of liability, the adequacy of warnings question. Bock also ignores the extent to which this kind of evidence might poison the entire proceedings, so that the jury's attention is directed away from the true trial issues to side concerns over whether the Plaintiff deserves compensation regardless of his case's merits. This is precisely why evidentiary rules designed to omit evidence which is unduly prejudicial, despite its relevancy, have been historically formulated.

Argument

Paul Green, once again, requests that the United States Supreme Court remand his case for a new trial, with instructions on the proper application of Rule 609 in civil cases.

Respectfully submitted,
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CERTIFICATE OF SERVICE

This will certify that completed copies of the Reply Brief for Petitioner to the U.S. Supreme Court were forwarded this date, September 28, 1988 by First Class Mail.